APPENDIX

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CHARLES ELMORE

Supreme Court of the United States

October Term, 1936.

No. 570.

SOUTHERN NATURAL GAS CORPORATION AND AMERICAN SURETY COMPANY OF NEW YORK,

Appellants,

vs.

STATE OF ALABAMA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA.

APPENDIX

To Brief of Appellants.

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INDEX.

CODE PROVISIONS:

Page

Code of 1896:

Section 1321. Admission fees exacted of foreign corporations 15
Section 4122. Paragraph 55. Annual license tax 15

Code of 1907:

Section 2391. Franchise tax required of foreign corporations 17
Section 3647. Franchise tax exacted of foreign corporations 17
Section 3651. Permits to do business in state; issuing and contents of 18

Code of 1923:

Section 3731. Foreign corporations, their agents, officers, etc., contracting or doing business without license, penalty for 7
Section 3732. Doing business without license, or after cancellation, misdemeanor, penalty for 7
Section 5424. Engaging in or carrying on business without license 8
Section 7209. Foreign corporation must file instrument of writing designating agent and place of business in this state 8
Section 7210. Where filed and fee for filing 8
Section 7211. Unlawful for foreign corporation to transact business in this state before declaration filed; penalty 9
Section 7212. Unlawful to act as agent of foreign corporation before such declaration is filed; penalty 9
Section 7213. Solicitor must enforce penalties; commissions 9
Section 7214. Franchise tax exacted of foreign corporations 10
Section 7215. Statement to be filed 10
Section 7216. Tax to be paid but once; failure to pay vitiates contracts 12
Section 7217. Exceptions 12
Section 7218. Permits to do business in state; issuing and contents of 13
Section 7219. Fees for issuing permits; payment into state treasury 13
Section 7220. Unlawful to do business without permit, contracts void 13

Page

STATUTES:

General Acts 1903, p. 295, Sec. 2 ____ 16

General Acts 1907, p. 418 ____ 18

General Acts 1907, p. 422 ____ 20

General Acts 1915, p. 397, Sec. 16 ____ 22

General Acts 1919, p. 291, Sec. 16 ____ 23

General Acts 1919, p. 294, Sec. 24 ____ 24

General Acts 1923, p. 164, Sec. 11 ____ 24

Revenue Act of 1927:

Section 42. Corporation permit ____ 1

Note to Section 42 ____ 2

Section 54. Annual franchise tax on foreign corporations ____ 3

Note to Section 54 ____ 4

Section 58. Written statement under oath by president or other officer of domestic corporations to state tax commission ____ 4

Section 59. Penalty for failure of domestic corporation to make report required in next preceding section ____ 5

Section 61. Franchise tax levied for calendar year: when due and delinquent, penalty may be remitted ____ 6

CONSTITUTION OF 1901, Section 232 ____ 25

FACSIMILE OF APPLICATION FOR PERMIT FOR 1931 26

FACSIMILE OF 1931 PERMIT ____ 27

REVENUE ACT OF 1927, APPROVED JULY 22, 1927

Sections 42, 54, 58, 59, 61

[General Acts 1927, page (139) 171, et seq.]

I The Initial and Annual Foreign Corporation License or Permit

"**Section 42.** *CORPORATION PERMIT.*—Every foreign or non-resident corporation, and all corporations organized under or by authority of the laws of any state or government other than the State of Alabama, in addition to other license and privilege taxes required to be paid by law, and for the purpose of registration and to prevent the duplication of names and in order to secure for the public record, for taxation, and for other purposes, the names and addresses of the said corporations and individual officers thereof, shall be required to procure from the Secretary of State when it is admitted or authorized by law to do business, and annually thereafter, a permit, which permit shall be prepared by and countersigned by the State Auditor and shall be delivered by the State Auditor to the Secretary of State in a well bound book with the stub and blanks therein showing the date thereof, the names of the corporations when issued, and the character of business engaged in by said corporation.

The issuance of such permit to any such corporation shall be prima facie evidence of its having complied with all the laws required of it before engaging in business in this State.

For all such permits said corporation shall, upon admission and when authorized to do business as a corporation, and annually thereafter, on or before the first day of February of every year pay to the Secretary of State a fee of Five Dollars ($5.00) per annum, or for a part of a year, if the capital employed in this State of such corporation is less than One Thousand Dollars; if more than One Thousand Dollars, and not over Ten Thousand Dol-

lars, it shall pay the sum of Ten Dollars ($10.00) if the capital employed in this State is in excess of Ten Thousand but not in excess of Twenty-five Thousand Dollars, a fee of Twenty Dollars ($20.00) shall be paid; if the capital employed in this State is in excess of Twenty-five Thousand Dollars and not in excess of Fifty Thousand, the fee shall be Fifty Dollars ($50.00); if the capital employed in the State is in excess of Fifty Thousand Dollars, the fee shall be One Hundred Dollars ($100.00).

The Secretary of State shall keep a full and complete account of all moneys received by him for and on account of such permit, and shall pay the same into the State Treasury as all other moneys collected or received by him are paid into the State Treasury. The Secretary of State shall send a statement monthly to the State Tax Commission of all fees paid hereunder.

No corporation, its agents, officers or servants shall transact any business for or in the name of such corporation within the State of Alabama without having first procured said permit, and all contracts, engagements or undertakings, or agreements with, by or to such corporation made without obtaining such permit, shall be null and void.

Application for said permit shall be made by said Corporations as provided by law, giving the name and address of said Corporation, its principal place of business where organized, its principal place of business in Alabama; its agent upon whom process can be served, his address and the names of the President and Secretary of said Corporation. (p. 171)

Note to Section 42

The provisions of Sec. 42 of the 1927 Act were split into separate sections by the Revenue Act of 1935, viz: Sections 809-811 (admission and qualification) and Section 813 (annual corporation permit). The provisions are in substance the same as the 1927 Act relating to the annual license or permit. The provisions relating to admission change the amount of the tax. Acts 1935, p. 381 (admission), p. 385 (annual permit).

The derivation of or antecedents to this section 42 may be found in

Code of 1896, Sec. 1321—admission fees.
Sec. 4122 (55)—annual corporate privilege tax.
Revenue Act of 1903 (p. 295), Sec. 2—annual license.
Revenue Act of 1907 (p. 418), Sec. 1—annual license.
General Acts 1907, p. 422, amending Sections 1321 and 1322 Code of 1896—admission fees.
Code of 1907: Section 2391—annual.
Section 3647—annual. Prepayment made condition precedent to transacting business.
Section 3651—admission permit.

Code of 1923, Sections 7209-7220—qualifying instruments, penalties, initial franchise tax. Section 7214 was declared by Section 7216 to be "the franchise tax exacted under Section 232 of the Constitution, and shall be paid but once only."

Admission permit (Sec. 7218) and annual permit (Sec. 7219).

Sections 3731-3732; Requirement of license and fine and hard labor penalty for doing business without obtaining.

Section 7208: Further invalidating contracts by foreign corporations which have not qualified to do business in Alabama.

Sections 7214, 7215, and 7216 of the Code of 1923 were repealed by Section 312 of the Revenue Act of 1935 (Acts, 1935, at p. 383).

The annotation to Michie's Alabama Code of 1928 (unofficial) reports Sections 7218, 7219, and 7220 of the Code of 1923 as superseded by the provisions of the Revenue Act of 1927 found in Section 42 of the 1927 Act.

An Act approved in 1931 (Act, 1931, pp. 335-6) arose out of a controversy between the Secretary of State, issuing the permits under Section 42 of the 1927 Act, and the Governor, as to the necessary office force, for handling permits, extended the time for taking out the permit, and transferred the handling of the application to the State Tax Commission.

II The Annual Franchise Tax on Foreign Corporations

Section 54. That every corporation organized under the laws of any other state, nation, or territory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of Two Dollars ($2.00) on each One Thousand Dollars of the actual amount of capital employed in this State. In ascertaining the annual franchise tax which shall be paid by any foreign corpora-

tion doing business in this State under this section, there shall be deduced from the amount of the capital employed by such corporation in this State the aggregate amount of loans of money made by such corporations in this State, and which shall be secured by existing mortgage or mortgages to it on real estate in this State, and upon which mortgages there shall have been paid the recording privilege tax provided by law. (p. 176)

Note to Section 54

Section 318 of the Revenue Act of 1935 (Acts 1935, at p. 387) re-enacts this section with the addition of these words:

> "Provided, that if a corporation has qualified to do business in this State it shall for the purpose of franchise tax prima facie be held to be doing business in the State of Alabama within the meaning of this Act."—Acts 1935, at p. 388.

The derivation of and antecedents to Section 54 of the Revenue Act of 1927 may be found in Section 16 of the Revenue Act of 1915 (Acts, 1915, at p. 397); in Section 16 of the Revenue Act of 1919 (Acts, 1919, at p. 291), and Section 11 of the Revenue Act of 1923 (Acts, 1923, p. 164, as amended at p. 267); also in the earlier statutes referred to in the foregoing annotation to Section 42, relating to an annual license or franchise tax upon the transaction of local business by foreign corporations.

III Miscellaneous Provisions and Penalties
(Sections 58, 59, 61—Revised Act of 1927)

Section 58. WRITTEN STATEMENT UNDER OATH BY PRESIDENT OR OTHER OFFICER OF DOMESTIC CORPORATIONS TO STATE TAX COMMISSION. The president or any executive officer or the secretary of every domestic corporation subject to the franchise tax under this Act shall make a written statement under oath of the State Tax Commission showing the following facts: (1) The date and place of incorporation and the total amount of subscribed stock with which it began business; (2) the total authorized capital stock of the corporation; (3) a brief statement of all property, real and personal, owned by the corporation in

Alabama, giving the location and value of such property by counties; (4) the balance sheet of such corporation as shown after closing its books on December 31st preceding or after closing its books at the end of its preceding fiscal year; (5) such other detailed information as the State Tax Commission may deem necessary to insure the collection of the tax due. The president or any executive officer or the secretary of every foreign corporation subject to the franchise tax under this Act shall make a written statement under oath to the State Tax Commission showing the following facts: First: The date and place of incorporation, and the date such corporation qualified to do business in this State; Second: The total amount of its capital employed in this State; Third: A brief statement of all property, real and personal, owned by the corporation in Alabama, giving the location and value of such property by counties: Fourth: The amount of capital employed in this State which is secured by existing mortgages on real estate in this State, upon which mortgage there shall have been paid the recording privilege tax provided by law; Fifth: Such other detailed information as the State Tax Commission may deem necessary to insure the collection of the tax due. The statement required by this section shall be made on blanks prepared and furnished by the State Tax Commission on application of the corporation or otherwise such blanks to be paid for out of the general appropriation for printing. Such written statements under oath to the State Tax Commission shall be made and filed with said State Tax Commission between the first day of January and the fifteenth day of March of the calendar year for the franchise tax to be paid for that calendar year. (p. 177)

[Re-enacted as Section 321 of the Revenue Act of 1935, Acts 1935, at p. 388]

Section 59. PENALTY FOR FAILURE OF DOMESTIC CORPORATION TO MAKE REPORT REQUIRED IN NEXT PRECEDING SECTION.—Any corporation failing to make the report required by the

next preceding section or to furnish all the information demanded on or before the fifteenth day of March of each year, shall be subject to a penalty of Ten Dollars a day for each day's failure, unless the time for filing the report has been extended by the State Tax Commission, or unless the State Tax Commission shall for good and sufficient cause remit the penalty provided in this section. Any suit for collection of this penalty shall be brought in the name of the State in any court of competent jurisdiction in Montgomery County, Alabama. (p. 178)

[Re-enacted as Sec. 322, Revenue Act of 1935; Acts 1935, at p. 389]

SECTION 61. *FRANCHISE TAX LEVIED FOR CALENDAR YEAR*: WHEN DUE AND DELINQUENT; PENALTY MAY BE REMITTED. The franchise tax of domestic and foreign corporations as authorized and levied by this Act shall run according to the calendar year and shall be due on the first day of April of each year for the tax of the current calendar year. Such corporation shall be allowed thirty days after the first day of April within which to pay said tax, but if delinquency continues after thirty days there shall be collected a penalty of one per cent (1%) for each month or part thereof that the tax shall remain unpaid after the beginning of the delinquent period. A foreign corporation, however, which has complied with provisions of this Act as to filing a sworn statement shall not be considered delinquent nor subject to the one per-cent monthly penalty until after thirty days from the date of the assessment against it by the State Tax Commission. Nothing in this section shall prevent suit against a foreign corporation which has failed to make the required report without an assessment first having been made against it by the State Tax Commission. The State Tax Commission, may for good cause remit the penalties provided in this section.

[Re-enacted as Sec. 324 of the Revenue Act of 1935; Acts 1935, at p. 390]

CODE PROVISIONS—CODE OF 1923

(There has been no official codification since the Code of 1923)

3731. *Foreign corporations, their agents, officers, etc., contracting or doing business in state without license, penalty for.*—Any corporation or any person acting as agent, servant, or officer of such foreign corporation or non-resident corporation, or corporation organized under or by authority of the laws of any state or government other than the state of Alabama, who shall make or attempt to make any contract, agreement, undertaking, or engagement with, by, or in the name of or for the use or benefit of any such corporation without a license authorizing such corporation to do business in this state, or after such license shall have been cancelled, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars, nor more than one thousand dollars, may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than twelve months, one or both, at the discretion of the jury trying the case.

3732. *Doing business without license, or after cancellation, misdemeanor, penalty for.*—Any corporation or any person acting as agent, servant, or officer of such foreign or non-resident corporation, or corporation organized under or by authority of the laws of any other state or government than the state of Alabama, who shall make or attempt to make, any contract, agreement, undertaking, or engagement with, by, or in the name of, or for the use or benefit of, any such corporation, without such license, or after the same shall have been cancelled as provided in article 25 (21) of chapter 273 (69) of this Code, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars nor more than one thousand dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than twelve months, one or both, at the discretion of the jury trying the case. It is not intended hereby to interfere with or prohibit the transaction of interstate

business authorized under the laws and Constitution of the United States.

5424. (7712) (3892) (4274) *Engaging in or carrying on business without license.*—Any person, firm or corporation who shall engage in or carry on any business or do any act for which a license is required by law, without having first paid for and taken out a license therefor, in the manner provided by law, shall, on conviction, be fined not less than the amounts of all licenses required of him, and if convicted for refusing to take out the license shall, on conviction, be fined not less than the amount of the state and county license due by him and not more than one hundred dollars in addition thereto, and may be sentenced to hard labor for the county for not more than six months; all fines to be paid in money, and, when collected, two-thirds shall be paid to the state, and one-third to the county. (Form 54 (54).) (1919, p. 282, §367.)

"**7209. (3642) (1316)** *Foreign corporation must file instrument of writing designating agent and place of business in this state.*—Every corporation not organized under the laws of this state shall, before engaging in or transacting any business in this state, file with the secretary of state a certified copy of its articles of incorporation or association and file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this state and an authorized agent or agents residing thereat; and when any such corporation shall amend its articles of incorporation or association, or shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this state."

"**7210. (3643) (1317)** *Where filed and fee for filing.*—Such instrument when filed by a corporation engaged in

any business of insurance must be filed in the office of the superintendent of insurance, and when filed by a corporation engaged in any other business than that of insurance must be filed in the office of the secretary of state, and there shall be paid at the same time for filing such instrument to the officer with whom the same is filed the sum of ten dollars for the use of the state. (1919, p. 831, Sec. 1.)."

"7211. (3644) (1318) *Unawful for foreign corporation to transact business in this state before declaration filed; penalty.*—It is unlawful for any foreign corporation to engage in or transact any business in this state before filing the written instrument provided for in the two preceding sections; and any such corporation that engages in or transacts any business in this state without complying with the provisions of the two preceding sections shall, for each offense, forfeit and pay to the state the sum of one thousand dollars."

"7212. (3645) (1319) *Unlawful to act as agent of foreign corporation before such declaration is filed; penalty.*—It is unlawful for any person to act as agent or transact any business, directly or indirectly, in this state, for or on behalf of any foreign corporation which has not designated a known place of business in this state and an authorized agent or agents residing thereat, as required in this article; and any person so doing shall, for each offense, forfeit and pay to the state the sum of five hundred dollars."

"7213. (3646) (1320) *Solicitor must enforce penalties; commissions.*—Every penalty provided for in this article shall be sued for and recovered in the name of the State of Alabama, by the solicitor of the circuit or county in which the offense is committed; and when collected, must be paid by the solicitor into the state treasury for the use of the state, less twenty-five per cent, to be retained by such solicitor for his services. The attorney-general shall represent the state in such actions carried to the supreme

court, and for his services therein is entitled to one-half the commissions herein allowed to the solicitor."

7214. (3647) (1321) *Franchise tax exacted of foreign corporations.*—No corporation created by the laws of any other state or of any foreign country, except foreign corporations which qualified to do business in this state prior to March 7, 1907, shall engage in or transact any business in this state without first having paid to the state tax commission, for the use of the state, the following franchise tax: Each foreign corporation whose actual amount of capital employed or to be employed in the state is one hundred dollars or less, shall pay a franchise tax of twenty-five per cent of the actual amount of capital employed or to be employed in the state by it. Each foreign corporation whose actual amount of capital employed in this state exceeds one hundred dollars and does not exceed one thousand dollars, shall pay a franchise tax of twenty-five per cent upon the first one hundred dollars of the actual amount of capital employed in this state by it, and five per cent upon all such remaining actual amount of capital employed in this state by it over one hundred dollars, and up to and not exceeding the said limit of one thousand dollars. Each foreign corporation whose actual amount of capital employed in this state exceeds one thousand dollars shall pay a franchise tax of twenty-five per cent upon the first one hundred dollars of actual amount of capital employed in this state by it and five per cent upon all such actual capital employed in this state by it over one hundred dollars and up to one thousand dollars, and one-tenth of one per cent of such actual amount of capital in excess of one thousand dollars. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax. (Const., Sec. 232).

[Repealed by Sec. 311 Acts of 1935, at p. 383]

7215 (3648) (1322) *Statement to be filed.*—Such foreign corporation shall, at the time of paying such tax, file in the office of the state tax commission an instrument of

writing under the seal of the corporation and signed officially by the president or other chief officer and the secretary of such corporation, showing the name of the corporation, and the state or county under whose laws it was incorporated, the amount of the total authorized capital of such corporation, the total amount of the actual paid-in capital of such corporation, its principal place of business, the name of the authorized agent of such corporation in this state and the post office address of such authorized agent of such corporation in this state and the location of the principal place of business of such corporation in this state, and also a statement showing the actual amount of capital employed in this state by such corporation, if such corporation is at the date of the filing of such statement engaged in business in this state, and if such corporation is not at the date of the filing of such statement engaged in business in this state, the statement shall state the actual amount of capital to be employed by such corporation in this state, which statement shall be sworn to by such president or other executive officer and the secretary of said corporation, before some officer authorized under the laws of this state to administer oaths or take acknowledgment of conveyances. If the state auditor shall have any reasons to believe that any statement made in such instrument so filed in his office is untrue, or that any fact or facts stated in such instrument are incorrectly stated, he shall have power to demand of such corporation, its officers or agents, an inspection of the books, records, and papers of the said corporation for the purpose of ascertaining the truth or falsity of any such statement, and any such corporation which shall refuse to permit the state auditor or such person as may be designated by him to inspect the books, records, and papers of such corporation when such inspection is demanded by the state auditor, shall not be permitted to transact any business or to do any act in its corporate capacity in this state until such inspection is made. If the state auditor, upon making such inspection of the books, records, and papers of such corporation, shall find that the amount of the capital to be

employed, or which is employed, by the said corporation in this state, is in excess of the amount stated in such statement filed by such corporation, he shall make demand upon such corporation, its officers or agents, for the payment of the difference in amount between the franchise tax for which such corporation would be liable upon the amount of capital set forth in said statement and the amount of franchise tax for which said corporation would be liable upon the amount of said capital as ascertained by the state auditor from his inspection of the books, records, and papers of such corporation, and any such corporation which shall fail or refuse for the space of sixty days after the date that such demand is made by the state auditor to pay such amount found by the state auditor to be due by it in excess of the amount shown to be due by it in such statement, shall not be permitted to engage in business or do any act in its corporate capacity in this state at any time within five years from the date of such demand.

[Repealed by Sec. 311, Acts of 1935, at p. 383]

7216. (3649) (1323) *Tax to be paid but once; failure to pay vitiates contracts.*—The tax required by the second preceding section shall be the franchise tax exacted under section 232 of the constitution, and shall be paid but once only; but such payment does not relieve any foreign corporation from the duty of complying with the requirements of existing laws. All contracts made in this state by any foreign corporation which has not first complied with the provisions of the two preceding sections, shall, at the option of the other party to the contract, be wholly void.

[Repealed by Sec. 311, Acts of 1935, at p. 383]

7217. (3650) (1324) *Exceptions.*—The provisions of this article do not apply to corporations organized under the laws of the United States; nor to corporations engaging in or transacting business of interstate commerce only within the state.

7218. (3651) *Permits to do business in state; issuing and contents of.*—Every foreign corporation or non-resident corporation, or corporation organized under or by authority of the laws of any state or government other than the State of Alabama, shall be required to procure from the secretary of state a permit admitting it to do business in the State of Alabama, which permit shall be prepared by and countersigned by the state auditor, and shall be delivered by the state auditor to the secretary of state in a well-bound book with a stub and blanks therein for showing the date thereof, the names of the corporations, and when issued, and the character or nature of business engaged in by said corporation. The issuance of such permit to any such corporation shall be prima facie evidence of its having complied with all the laws required of it before engaging in business in this state.

[Michie's supplement (1936) to Michie's Code of 1928 (unofficial) records this section as suspended by the provisions of Sec. 42, Rev. Act of 1927, p. 69]

7219. (3652) *Fees for issuing permits; payment into state treasury.*—For such permit the said corporation shall, on the first day of January of every year, pay to the secretary of state a fee of ten dollars per annum or for any part of a year. The secretary of state shall keep a full and complete account of all moneys received by him for and on account of such permit, and shall pay the same into the state treasury, as all other moneys collected or received by him are paid into said treasury.

[Michie's supplement (1936) to Michie's Code of 1928 (unofficial) records this section as suspended by the provisions of Sec. 42 Rev. Act of 1927, p. 69]

7220. (3653) *Unlawful to do business without permit, contracts void.*—No such corporation, its agents, officers, or servants, shall transact any business for or in the name of such corporation within the State of Alabama without having first procured said permit, and all contracts, en-

gagements, or undertakings or agreements with, by, or to such corporation, made without obtaining such permit, shall be null and void.

[Michie's supplement (1936) to Michie's Code of 1928 (unofficial) records this section as suspended by the provisions of Sec. 42 Rev. Act of 1927, p. 69]

IV ANTECEDENT CODE AND STATUTORY PROVISIONS

Code of Alabama—1896

1321. Admission fees exacted of foreign corporations.—No corporation created by the laws of any other state or of any foreign country shall engage in or transact any business in this state without first having paid into the treasury, for the use of the state, the following fees: Where the capital stock of such corporation does not exceed fifty thousand dollars, a fee of twenty-five dollars; where it exceeds fifty thousand dollars, but does not exceed one hundred thousand dollars, a fee of fifty dollars; where it exceeds one hundred thousand dollars, but does not exceed two hundred and fifty thousand dollars, a fee of seventy-five dollars; where it exceeds two hundred and fifty thousand dollars, but does not exceed five hundred thousand dollars, a fee of one hundred dollars; where it exceeds five hundred thousand dollars, but does not exceed one million dollars, a fee of two hundred dollars; where it exceeds one million dollars, a fee of two hundred and fifty dollars. All corporations or mutual companies which have no capital stock shall pay a fee of twenty-five dollars.

NOTE: Amended by Act approved March 7, 1907, post, p. 20.

4122. Par. 55. All corporations doing business in this state, whether organized in this state or another state or country, not otherwise specifically required to pay a license-tax, shall pay annually the following privilege taxes: Corporations whose paid-up capital stock is under ten thousand dollars, ten dollars. Corporations whose paid-up capital stocks exceeds ten thousand dollars and does not exceed fifty thousand dollars, twenty-five dollars; when the paid-up capital stock exceeds fifty thousand dollars and is not over one hundred thousand dollars, forty dollars; where the paid-up capital stock exceeds one hundred thousand dollars and does not exceed two hundred thousand, seventy-five dollars; where the paid-up capital stock exceeds two hundred thousand dollars, and does not exceed three hundred thousand dollars, one hundred and twenty-five dollars; where the paid-up capital stock exceeds three hundred thousand dollars and does not exceed four hundred thousand dollars, one hundred and seventy dollars; where the paid-up capital stock exceeds four hundred thousand dollars and does not exceed five hundred thousand dollars, two hundred dollars; where the paid-up capital stock exceeds five hundred thousand dollars and does not exceed one million dollars, three hundred dollars; where the paid-up capital stock exceeds one million dollars, five hundred dollars; when application is made for the license herein provided, it shall be accompanied by the affidavit of the president

or other chief officer of the corporation showing the amount of the capital stock of such corporation, but the payment of this tax in one county in the state as evidenced by the license or official certificate of the judge of probate shall be sufficient; **Provided**, that the provisions of this subdivision shall not apply to banks and banking institutions regularly organized as such.

GENERAL ACTS 1903—page 295, Sec. 2.

SEC. 2.—That said act entitled an act to better provide for the Revenue of the State be further amended by adding there to the following additional sections. A. Every foreign corporation, except railroad, telegraph, long distance telephone, express and sleeping car, life and fire insurance companies, building and loan associations, banks or banking associations, authorized to do business under the general law, shall pay to the Judge of Probate of the county in which it has a resident agent, a license fee of one-tenth of one percentum for the use of the State, and of one half that sum for the use of the county, for the privileges of exercising its corporate franchises or for carrying on its corporate business in such corporate or organized capacity in this State, to be computed upon the basis of the actual amount of capital employed by it within this State. The tax hereby imposed shall be due and payable on the first day of January of each year by every such foreign corporation then doing business in this State, to be computed upon the basis of the amount of capital actually employed by it within the State during the year preceding such date. Every foreign corporation, not authorized to do business in this State, shall pay to the State Treasurer, for the use of the State, a tax of one tenth of one percentum upon the amount of capital to be actually employed in this State before filing in the office of the Secretary of State the papers necessary to entitle it to do business in the State. B. The president, or other executive head, and the secretary, of every foreign corporation subject to a tax under this act, shall make a written statement, under their oaths, to the Judge of Probate, if the tax is payable to him, or to the State Auditor, if the tax is payable to the Treasurer, showing the name of the corporation, the State or county under whose laws it was incorporated, its principal place of business in the State, the total amount of its capital stock, the actual amount of capital employed in this State if it is a corporation at the time of the statement authorized to do business in the State, or the actual amount of capital it is proposed shall be employed in the State if it is a corporation not then qualified to do business in the State. The Judge of Probate, or the Auditor, as the case may be, shall have power to summons before him any of the officers of the corporation, or any other witness, and to swear and examine them and to inspect any of the books, papers or document of the

corporation, and for that purpose to compel their production; and if he is satisfied from evidence thus obtained that the amount of capital of the corporation actually employed, or to be employed as the case may be, in this State, is placed in the statement at a less amount than it should be, it shall be his duty to demand payment of the tax upon the amount of capital which he finds is actually employed or to be employed in this State. Either the State or the corporation may appeal from his finding to the Circuit Court in the same manner as may be done when the Court of County Commissioners passes upon a contested assessment of property for taxation, and the proceedings subsequent to the appeal shall be the same as in such cases. C. No foreign corporation which has paid the taxes required under this act shall be required to pay taxes imposed by subdivision 24* of Section 4122, or Section 1321, of the Code. D. No foreign corporation required to pay a tax under this act, shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of this State, upon a contract made in this State other than contract based upon interstate commerce unless such corporation shall have paid such tax within sixty days after the same became due. Provided, that this act shall not apply to foreign corporations engaged in the business of lending money in Alabama. This act shall not take effect till January 1, 1904. The payment of the franchise tax in any one county shall be sufficient, notwithstanding the corporation may do business or have a resident agent in more than one county.

Code of Alabama. 1907. Sections 2391, 3847, 3851

2391. Franchise tax required of foreign corporations.—Every foreign corporation authorized to do business in this state, except strictly benevolent, educational, or religious corporations, shall pay annually to a judge of probate of a county in which it has a resident agent, a franchise tax for the use of the state, and for the amounts specified in the next succeeding section.

3847. (1321) Franchise tax exacted of foreign corporations.—No foreign corporation created by the laws of any other state or of any foreign country shall, after being duly permitted to do business in this state, engage in or transact any business in this state without first having paid into the treasury, for the use of the state, the following franchise tax: Each foreign corporation whose actual amount of capital employed in the state, is one hundred dollars or less, shall pay a franchise tax of twenty-five per cent of the actual amount of capital employed in the state by it. Each foreign corporation whose actual amount of capital employed in this state exceeds one hundred dollars and does not exceed one thousand dollars, shall pay a franchise tax of twenty-five per cent upon the first

* This is an error. The reference was obviously to Subdivision 35.

one hundred dollars of the actual amount of capital employed in this state by it, and five per cent upon all such remaining actual amount of capital employed in this state by it over one hundred dollars, and up to and not exceeding the said limit of one thousand dollars. Each foreign corporation whose actual amount of capital employed in this state exceeds one thousand dollars shall pay a franchise tax of twenty-five per cent upon the first one hundred dollars of such actual amount of capital employed in this state by it and five per cent upon all such actual capital employed in this state by it over one hundred dollars and up to one thousand dollars, and one-tenth of one per cent of such actual amount of capital in excess of one thousand dollars. All corporations or mutual companies which have no capital stock shall pay a fee of twenty-five dollars.

3851. Permits to do business in state; issuing and contents of. —Every foreign corporation or nonresident corporation, or corporation organized under or by authority of the laws of any state or govenment other than the State of Alabama, shall be required to procure from the secretary of state a permit admitting it to do business in the State of Alabama, which permit shall be prepared by and countersigned by the state auditor, and shall be delivered by the state auditor to the secretary of state in a well-bound book with a stub and blanks therein for showing the date thereof, the names of the corporations, and when issued, and the character or nature of business engaged in by said corporation.

GENERAL ACTS OF 1907—page 418

Section 1. Be it enacted by the Legislature of Alabama, That every foreign corporation authorized to do business in this State under the laws of the State of Alabama, except strictly benevolent, educational or religious corporation, shall pay annually to the Judge of Probate of the county in which it has a resident agent, a franchise tax for the use of the State of Alabama, as follows: A. Each foreign corporation whose actual amount of capital employed in this State, is one hundred dollars or less, shall pay an annual franchise tax of twenty-five per centum of the actual amount of capital employed in this State by it. B. Each foreign corporation, whose actual amount of capital employed in this State exceeds one hundred dollars and does not exceed one thousand dollars, shall pay an annual franchise tax of twenty five per centum upon the first one hundred dollars of the actual amount of capital employed in this State by it, and five per centum upon all such remaining actual amount of capital employed in this State by it, over one hundred dollars, and up to and not exceeding the said limit of one thousand dollars. C. Each foreign corporation whose actual amount of capital employed in this State exceed One Thousand Dollars shall pay an annual franchise tax of twenty-five per centum on the first One

Hundred Dollars of such actual amount of capital employed in this State by it, and five per centum upon all such actual capital employed by it in this State in excess of One Hundred Dollars and up to and including One Thousand Dollars, and one tenth of one per centum upon all such remaining actual amount of capital employed in this State by it over and above One Thousand Dollars. E. The President, or other executive head, and the Secretary of every foreign corporation subject to a tax under this Act, shall make a written statement, under their oath, to the Judge of Probate, showing the name of the corporation, the State or County under whose laws it was incorporated, its principal place of business in this State, the total amount of its capital stock, the actual amount of capital employed in this State, if it is a corporation at the time of the statement authorized to do business in this State, or the actual amount of capital it is proposed shall be employed in this State if it is a corporation not then qualified to do business in this State. The Judge of Probate shall have power to summon before him any of the officers of the corporation, or any other witness, and to swear and examine them and to inspect any of the books, papers or documents of the corporation, and for that purpose to compel their production; and if he is satisfied from the evidence thus obtained that the amount of the capital of the corporation actually employed, or to be employed as the case may be, in this State, is placed in the statement at a less amount than it should be, it shall be his duty to demand payment of the tax upon the amount of capital which he finds is actually employed in this State. Either the State or the corporation may appeal from his finding to the Circuit Court in the same manner as may be done when the Court of County Commissioners passes upon a contested assessment of property for taxation, and the proceeding subsequent to the appeal shall be the same as in such cases. F. No foreign corporation which has paid the tax required under this Act, shall be required to pay the taxes imposed by Subdivision 24 of Section 4122 of the Code of 1896 as amended by an Act of the General Assembly entitled An Act to further amend the Revenue laws of the State of Alabama, approved March 5th 1901. G. No foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of this State, upon a contract made in this State other than contracts based upon interstate commerce unless such corporation shall have paid such tax within sixty days after the same became due. H. No corporation required by the provisions of this Act to pay a franchise tax which corporation shall have paid the license taxes for this current year as provided by the corporation laws now in force in this State shall be required to pay a franchise tax under this Act before the first day of January 1908.

I. The payment of the franchise tax required by this act, in any one county shall be sufficient, notwithstanding the said corporation may do business, or have a resident agent in more than one County. J. The payment of the franchise tax herein required shall not exempt any corporation paying the same from the payment of the regular license or privilege tax specified or required for engaging in or carrying on any business for the engaging in or carrying on of which a license is required of individuals, firms or corporations.

Section 2. That in addition to the amount of franchise tax required to be paid by each foreign corporation to the State, such foreign corporation shall pay to the County for the use of such County an amount equal to one half of the amount paid by it to the State; and such amount so received shall be paid over by the Probate Judge to the County treasurer for the use of the County.

Approved March 7, 1907.

GENERAL ACTS OF 1907—page 422.

AN ACT

To amend sections 1321 and 1322 of the code of 1896.

Section 1. Be it enacted by the Legislature of Alabama, That section 1321 of the code of 1896 be and the same is hereby amended so as to read as follows: 1321. Admission fees exacted of foreign corporations. No corporation created by the laws of any other State or of any foreign country shall engage in or transact any business in this State without first having paid into the treasury, for the use of the State the following charter fees: Each foreign corporation whose actual amount of capital employed or to be employed in this State, is one hundred dollars or less, shall pay a charter fee of twenty-five per centum of the actual amount of capital employed or to be employed in the State by it. Each foreign corporation whose actual amount of capital employed in this State exceeds one hundred dollars and does not exceed one thousand dollars, shall pay a charter fee of twenty-five per centum upon the first one hundred dollars of the actual amount of capital employed in this State by it, and five per centum upon all such remaining actual amount of capital employed in this State by it over one hundred dollars, and up to and not exceeding the said limit of one thousand dollars. Each foreign corporation whose actual amount of capital employed in this State exceeds one thousand dollars shall pay a charter fee of twenty-five per centum upon the first one hundred dollars of actual amount of capital employed in this State by it and five per centum upon all such actual capital employed in this State by it over one hundred dollars and up to one thousand dollars. And one-tenth of one per cent of such actual amount of capital in excess

of $1000.00. All corporations or mutual companies which have no capital stock shall pay a fee of twenty-five dollars, provided that all foreign corporations which have heretofore, bona fide, qualified under prior existing laws shall receive a credit for the amount so paid by them on any amount falling due by the provisions of this act.

Sec. 2. That section 1322 of the code of 1896 be and the same is hereby amended so as to read as follows: 1322. Statement to be filed. Such foreign corporation shall at the time of paying such fee into the treasury file in the office of the State auditor an instrument of writing under the seal of the corporation and signed officially by the president or other chief officer and the secretary of such corporation, showing the name of the corporation, and the State or county under whose laws it was incorporated, the amount of the total authorized capital of such corporation, its principal place of business, the name of the authorized agent of such corporation in this State and the post office address of such authorized agent of such corporation in this State and the location of the principal place of business of such corporation in this State and also a statement showing the actual amount of capital employed in this State by such corporation if such corporation is at the date of the filing of such statement engaged in business in this State, and if such corporation is not at the date of the filing of such statement engaged in business in this State, such statement shall state the actual amount of capital to be employed by such corporation in this State, which statement shall be sworn to by such president or other executive officer and the secretary of said corporation before some officer authorized under the laws of this State to administer oaths or take acknowledgment of conveyance. If the auditor shall have any reason to believe that any statement made in such instrument so filed in his office is untrue or that any fact or facts stated in such instrument or incorrectly stated, he shall have power to demand of such corporation, its officers or agents, an inspection of the books, records and papers of the said corporation for the purpose of ascertaining the truth or falsity of any such statement, and any such corporation which shall refuse to permit the auditor or such person as may be designated by him to inspect the books, records and papers of such corporation when such inspection is demanded by the auditor, shall not be permitted to transact any business or do any act in its corporate capacity in this State until such inspection is made. If the auditor upon making such inspection of the books, records and papers of such corporation shall find that the amount of the capital to be employed or which is employed by the said corporation in this State is in excess of the amount stated in such statement filed by such corporation he shall make demand upon such corporation its officers or agents for the payment of the difference

in amount between the charter fee for which such corporation would be liable upon the amount of capital set forth in said statement and the amount of the charter fee for which such corporation would be liable, upon the amount of said capital as ascertained by the auditor from his inspection of the books, records and papers of such corporation and any such corporation which shall fail or refuse for the space of sixty days after the date that such demand is made by the auditor to pay such amount found by the auditor to be due by it in excess of the amount shown to be due by it in such statement, shall not be permitted to engage in business or do any act in its corporate capacity in this State at any time within five years from the date of such demand.

Approved March 7, 1907.

Acts 1915, at p. 387—Section 16.

Sec. 16. Every corporation organized under the laws of this State, except strictly benevolent, educational or religious corporations, or banks or banking institutions, or building and loan associations regularly organized under the laws of this State, or any other state, shall pay annually to the State an annual franchise tax of forty cents on each one thousand dollars of its paid up capital stock. Every corporation organized under the laws of any other state, nation or territory and doing business in this State, except strictly benevolent, educational or religious corporations, or banks or banking institutions, or building and loan associations, shall pay annually to the State an annual franchise tax of forty cents on each one thousand dollars on the amount of capital actually employed in this State. Subdivision 1. The president or any executive officer or the secretary of every corporation subject to a franchise tax under this section, shall make a written statement under oath to the probate judge showing the name of the corporation, the State or country under whose laws incorporated, its principal place of business in this State; if a domestic corporation, the amount of its capital stock; if a foreign corporation, the actual amount of capital employed in this State; if it is a corporation at the time of the statement authorized to do business in this State; or the actual amount of capital it is proposed shall be employed in this State, if it is a corporation not then qualified to do business in this State. Subdivision 2. The judge of probate with whom any such statement is filed may summon before him any of the officers of the corporation, or any other witness, and swear and examine them, and inspect any of the books, papers, or documents of the corporation, and for that purpose may compel the production as courts of equity might do; and if he is satisfied from the evidence thus obtained that the amount of the capital of the corporation is less than stated, and in the case of foreign corporation that the amount of

capital actually employed or to be employed, as the case may be, in this State is placed in the statement at a less amount than it should be, he shall demand payment of tax upon the amount of capital which he finds is actually employed or to be employed in this State. Subdivision 3. Either the State or the corporation may appeal from the finding of the probate judge to the circuit court in the same manner as may be done when any court of county commissioners passes upon a contested assessment of property for taxation, and the proceeding subsequent to the appeal shall be the same as in such cases. Subdivision 4. No foreign corporation required to pay a tax under this article shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of this State upon a contract made in this State other than contracts based upon interstate commerce, unless such corporation shall have paid such tax within sixty days after the same became due. Subdivision 5. The payment of the franchise tax required by this article in any one county shall be sufficient, notwithstanding the said corporation may do business or have a resident agent in more than one county. Subdivision 6. The payment of the franchise tax required by this article shall not exempt any corporation paying the same from the payment of the regular license or privilege tax specified or required for engaging in or carrying on any business for the engagin in or carrying on of which a license is required of individuals, firms, or corporations. Subdivision 7. In addition to the amount of franchise tax required by this section to be paid to the State, the courts of county commissioners or other courts of like jurisdiction may at any regular or special term levy a county franchise tax in such amount not exceeding fifty per cent. of the State franchise tax, for county purposes as in its judgment may be necessary; provided, that payment in one county only shall be required. Subdivision 8. In ascertaining the amount of the annual franchise tax which shall be paid by any foreign corporation doing business in this State under this section, there shall be deducted from the amount of the capital employed by such corporation in this State the aggregate amount of loans of money made by such corporations in this State, and which shall be secured by existing mortgage or mortgages to it on real estate in this State, and upon which mortgages there shall have been paid the recording privilege tax provided by law.

Acts 1919, p. 291—Section 16.

Section 16. That every corporation organized under the laws of any other State, nation or territiory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of

sixty cents on each one thousand dollars of the amount of capital actually employed in this State. In ascertaining the amount of the annual franchise tax which shall be paid by any foreign corporation doing business in this State under this section, there shall be deducted from the amount of capital employed by such corporation in this State the aggregate amount of loans of money made by such corporations in this State, and which shall be secured by existing mortgage or mortgages to it on real estate in this State, and upon which mortgages there shall have been paid the recording privilege tax provided by law.

Acts 1919, p. 294—Section 24.

Section 24. That the franchise tax of foreign and domestic corporations as authorized and levied by this act, shall run according to the calendar year, and shall be due on the first day of January of each year for the tax of the current calendar year. Such corporation shall be allowed thirty days after the first of January within which to pay said tax, but if delinquency continues after thirty days, there shall be collected a penalty of five percent for each month or part thereof, that the tax shall remain unpaid after the beginning of the delinquent period. In the case of a corporation not incorporated or doing business in the State during the year preceding the year for which the tax is to be paid, or that had not entered the State during said period, but which is organized or enters the State after January 1st., and during the calendar year for which the tax is assessed and levied, the said franchise tax under the terms of this act owing by such corporation shall be due and payable within thirty days after the State tax commission has fixed the amount of the tax, and if not paid within said term of thirty days, the tax shall become delinquent and a penalty shall accrue of five per cent of the amount of the tax owing for each thirty days or fractional part thereof the same is delinquent.

Acts 1923, p. 184—Section 11.

Section 11. That every corporation organized under the laws of any other state, nation or territory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of sixty cents on each one thousand dollars of the actual amount of capital employed in this State. In ascertaining the annual franchise tax which shall be paid by any foreign corporation doing business in this State under this section, there shall be deducted from the amount of the capital employed by such corporation in this State the aggregate amount of loans of money made by such corporations in this State, and which shall be secured by existing mortgage or mortgages to it on real estate in this State, and upon which mortgages there shall have been paid the recording privilege tax provided by law.

Section 232 of the Constitution provides:

"No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax."

FOREIGN CORPORATION

STATEMENT OF APPLICATION BY FOREIGN CORPORATION FOR PERMIT FOR THE TRANSACTION OF BUSINESS IN THE STATE OF ALABAMA DURING THE CURRENT YEAR

TO THE SECRETARY OF STATE OF THE STATE OF ALABAMA:

The Southern Natural Gas Corporation, a corporation organized under the laws of Delaware, being desirous of entering, or having entered, the State of Alabama for the transaction of business therein, files the following statement under an Act of the Legislature of Alabama, approved July 22nd, 1927:

That the name of the corporation is Southern Natural Gas Corporation

That its address is 19-21 Dover Green, Dover, Delaware.

That it was incorporated under the laws of Delaware

That its principal place of business in Alabama is 1403 Watts Building, Birmingham, Alabama.

That the name of its authorized agent thereat is J. H. White.

That the actual amount of capital employed in the State of Alabama is No capital invested in State Used in intra state commerce. Company engaged solely in inter-state commerce.

Name of President of said corporation J. H. White

Name of Secretary of said corporation Wm. R. Gignilliat

IN WITNESS WHEREOF, the said corporation or association has caused these presents to be signed by its secretary, and attested by its corporate seal, at its office in Birmingham, Alabama, this the 23rd day of December 1927.

Wm. R. Gignilliat

NOTICE: For all such permits said corporation shall pay [illegible]

No. 210 THIS PERMIT EXPIRES
DECEMBER 31, 1931

Amt. Capital Employed $ None
Amount Permit $ 5.00

Foreign Corporation Permit, 1931

19 31

THE STATE OF ALABAMA

OFFICE OF SECRETARY OF STATE

THIS IS TO CERTIFY That Southern Natural Gas Corporation a corporation organized under the laws of Delaware and engaged in the business of Interstate transportation & sale of gas for light, heat & power has paid the Secretary of State the sum above set out as required by Section 42 of an Act approved July 22, 1927. This permit is therefore issued authorizing the doing of business in the State of Alabama by said corporation for the year 1931, and is subject to the terms and conditions of said Act.

Countersigned:

P. O. Blan
State Auditor.

1-2- 1931

Jno Brandon
Secretary of State.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1936

No. 570

SOUTHERN NATURAL GAS CORPORATION
AND AMERICAN SURETY COMPANY
OF NEW YORK

Appellants,

vs.

STATE OF ALABAMA,

Appellee.

APPEAL FROM THE SUPREME COURT OF
THE STATE OF ALABAMA

BRIEF FOR THE APPELLEE

A. A. CARMICHAEL,
Attorney General of Alabama.

JOSEPH P. CHAMBERLAIN,
NOEL T. DOWLING,
FRONTIS H. MOORE,
Special Assistants to the Attorney General of Alabama.

Counsel for Appellee

Supreme Court of the United States

OCTOBER TERM 1936

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SUBJECT INDEX

Page

I. Questions Presented 2

II. The Statute Involved 3

III. Statement of the Case 6

IV. Statement of the Facts 7

V. Summary of Argument 19

VI. Argument 26

a. The franchise tax is laid on the exercise of corporate functions or the privilege of exercising corporate functions 26

b. Doing business, as used in Sec. 54, Acts 1927, page 176, and Sec. 232 of the Constitution, means the right or privilege of exercising corporate functions in the State of Alabama 33

c. The privilege of exercising and the exercise of corporate functions is a legitimate object of the State's power to tax 36

1. Appellant sought and obtained the privilege of exercising corporate functions 36

2. Appellant not only sought the privilege of exercising corporate functions in Alabama, but had actually exercised such corporate functions.. 37

SUBJECT INDEX—Continued

d. The tax is not levied on interstate commerce or on the receipts therefrom, but is a corporate franchise tax on the right or privilege of exercising corporate functions or the exercise of corporate functions. The tax is not a license tax upon the business conducted by the corporation. A tax otherwise valid may be measured by property used in interstate commerce 78

e. The corporation was not engaged purely in interstate commerce 85

VII. The General Argument and Appellant's Brief 101

VIII. Conclusion 118

IX. Appendix 125

INDEX OF CASES CITED

Page

Airway v. Day, 266 U. S. 71 122
Anglo Chilean Nitrate Sales Corp., v. State of Alabama, 288 U. S. 218 ..... 20, 22, 70
Ashley vs. Ryan, 153 U. S. 436; 14 S. Ct. 865; 38 L. Ed. 773 ..... 22, 43, 45, 80
Armour & Co. v. Virginia, 246 U. S. 1 84
Atlantic Coast Line Ry. Co. v. Ala., 253 U. S. 489, 40 Sup. Ct. 485, 64 L. Ed. 1027 27
Atlantic Coast Line v. Standard Oil Co. 275 U. S. 257 ..... 89, 94
Atlantic Lbr. Co. v. Commissioner of Corporations of Mass., 298 U. S. 553, 56 Sup. Ct. 887 ..... 21, 66, 70
Atlantic & Pacific Tel. Co. v. Philadelphia, 190 U. S. 163, 47 L. Ed. 995 ..... 26, 39
Attorney General v. Bay State Mining Co., 99 Mass. 148, 96 Am. Dec. 717 ..... 23, 25, 66
Beard v. Union & American Pub. Co., 71 Ala. 60 ..... 19, 32, 56
Brown v. Maryland, 12 Wheat. 419 89
Champion Copper Co., 246 U. S. 155 ..... 64, 68
Cheney Bros. Co. v. Mass., 246 U. S. 147, 38 Sup. Ct. 295, 62 L. Ed. 632 21
Chicago M., St. P. & P. R. Co. v. Risty, 276 U. S. 567, 48 Sup. Ct. 396, 72 L. Ed. 703 77
Citizens, etc., v. Buckheit, 14 Ala. App. 511 109
Concordia Ins. Co. v. School District, 282 U. S. 545, 51 Sup. Ct. 275, 75 L. Ed. 528 77
Cooney v. Mountain States Tel. & Tel. Co., 55 Sup. Ct. 477, 294 U. S. 384 122

INDEX OF CASES CITED—Continued

Page

Copper Range Co., 246 U. S. 155.....64, 68
Detroit International Bridge Corp. v. Corporation Tax Appeal Board, 287 U. S. 295, 53 Sup. Ct. 137, 77 L. Ed. 314.....20, 22, 28, 48
Detroit Properties Corp., 254 Mich. 523, 236 N. W. 850..... 76
East Ohio Gas Co. v. Tax Commission, 283 U.S. 471 88
Educational Films v. Ward, 282 U. S. 379, 51 Sup. Ct. 170, 75 L. Ed. 400, 71 A. L. R. 1226 .....21, 37, 80
Ewart Lbr. Co. v. American Cement Plaster Co., 9 Ala. App. 152, 62 So. 560.....105
Farrior v. New England Securities Co., 88 Ala. 275, 7 So. 200 .....19, 34
Flint v. Stone Tracy Co., 220 U. S. 107.....21, 38, 80
Home Ins. Co. v. New York, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025 .....21, 39, 80
Horn Silver Mining Co. v. New York, 143 U. S. 305 .....21, 42
International Harvester Co. v. Ky., 234 U. S. 584 114
International Shoe Co. v. Shartel, 29 Fed. (2d) 604 81
Interstate Tr., etc., Co. v. Nat'l. Stockyards Bank, 200 Ala. 424, 76 So. 356.....108
Investors Syndicate v. State, 149 So. 83, 227 Ala. 216 .....20, 29

INDEX OF CASES CITED—Continued

Page

Kansas v. Independence Gas Co., 99 Kan. 671, 163 P. 148, L.R.A. 1917-D 1070.....23, 25, 66
Kansas City, Memphis & B'ham. R. R. Co. v. Stiles, 182 Ala. 138, 62 So. 734, 37 Sup. Ct. 58, 61 L. Ed. 176, 242 U. S. 111.....5, 22, 47
K. C. F. S. & M. R. Co. v. Botkin, 240 U. S. 227, 36 Sup. Ct. 261, 60 L. Ed. 617.....21, 47
Leisy v. Hardin, 135 U. S. 100..... 89
Louisville & Nashville R. R. Co. v. The State, 201 Ala. 317, 78 So. 93, 248 U. S. 533, 39 Sup. Ct. 18, 63 L. Ed. 406 4
Michigan v. Michigan Trust Co., 286 U. S. 334, 53 Sup. Ct. 512 .....20, 48, 76
Missouri Gas Co. v. Kansas Gas Co., 265 U. S. 298 92
Muller Mfg. Co. v. First Nat'l. Bank of Dothan, 176 Ala. 229, 57 So. 762.....20, 105
Nelms v. Edinburg American Land Mtg. Co., 92 Ala. 157, 9 So. 141..... 19
New England Mortgage Security Co. v. Ingram, 91 Ala. 337, 9 So. 140..... 19
New York v. Roberts, 171 U. S. 658..... 85
Ozark Pipe Line v. Monier, 266 U. S. 555, 45 Sup. Ct. 184, 69 L. Ed. 439.....68, 117, 123
Pacific Co. v. Johnson, 285 U. S. 440, 52 Sup. Ct. 424 80
Penn. Gas Co. v. Pub. Ser. Com., 252 U. S. 23..... 92
Penn. Mutual Lf. v. State, 135 So. 346.....107
Postal Telegraph Co. v. Adams, 155 U. S. 688, 15 Sup. Ct. 268, 39 L. Ed. 311.....21, 41

INDEX OF CASES CITED—Continued

Page

Public Utilities v. London, 249 U. S. 239..... 91
St. Louis, San Francisco Ry. Co. v. Middlekamp, 256 U. S. 226 72
St. L. & S. W. R. R. v. Arkansas, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. 265.....21, 43
Society of Savings v. Coite, 6 Wall. 594.....41, 79
Sonneborn v. Cureton, 262 U. S. 506..... 87
Southern Cotton Oil Co. v. Wemple, 44 Fed. 24.. 73
State v. Anglo Chilean Nitrate Sales Corp., 142 So. 87, 225 Ala. 141, 288 U. S. 218, 53 Sup. Ct. 373, 77 L. Ed. 710 20
State v. Atlantic Coast Line Ry. Co., 202 Ala. 558, 81 So. 60 27
State v. Bradley, 207 Ala. 677, 93 So. 595, 76 L. Ed. 1136 .....20, 28
State v. Flannelly, 96 Kan. 372, 153 Pac. 22..... 88
State v. Nat'l. Cash Credit Ass'n., 224 Ala. 629, 141 So. 541 30
State v. Southern Natural Gas Corporation, 170 So. 178 20
State Tax Commission v. Gas Co., 284 U. S. 41....123
Sullivan v. Sullivan Timber Co., 103 Ala. 371, 15 So. 941 .....19, 33
Utah Power & Light Co. v. Pfost, 286 U. S. 165, 52 Sup. Ct. 548 87
West Va. & M. D. Gas Co. v. Public Serv. Com. 134 Md. 137, 106 Atl. 265 Cf..... 89
Wheeling Steel Corporation v. Fox, 298 U. S. 193, 56 Sup. Ct. 773..... 59

STATUTES CITED

Page

Alabama General Acts 1927, Page 176, Sec. 59 ..... 77, 112
Alabama General Acts 1927, Page 176, Sec. 58 77
Alabama General Acts 1927, Page 176, Sec. 54 ..... 2, 3, 30, 52, 101
Alabama General Acts 1927, Page 171, Sec. 42 103
Alabama General Acts 1927, Page 172, Sec. 42 77
Alabama General Acts 1923, Page 266 4
Alabama General Acts 1923, Page 146, Sec. 11 4
Alabama General Acts 1919, Page 291, Sec. 16 4
Alabama General Acts 1915, Page 297, Sec. 16 4
Alabama General Acts 1907, Page 200 107
Alabama Constitution 1901, Sec. 211 79
Alabama Constitution 1901, Sec. 214 79
Alabama Constitution 1901, Sec. 217 79
Alabama Constitution 1901, Sec. 229 ..... 5, 119
Alabama Constitution, 1901, Sec. 232 ..... 5, 77, 79, 101, 106
Alabama Code of 1923, Sec. 3732 109
Alabama Code of 1923, Sec. 7209 ..... 77, 104, 108
Alabama Code of 1923, Sec. 7211 ..... 77, 108
Alabama Code of 1923, Sec. 7212 ..... 77, 108
Alabama Code of 1923, Sec. 7213 ..... 77, 108
Alabama Code of 1923, Sec. 7214 ..... 106, 107
Alabama Code of 1923, Sec. 7215 107
Alabama Code of 1923, Sec. 7216 ..... 77, 107
Alabama Code of 1923, Sec. 7220 ..... 77, 108

Supreme Court of the United States

OCTOBER TERM 1936

No. 570

SOUTHERN NATURAL GAS CORPORATION
AND AMERICAN SURETY COMPANY
OF NEW YORK

Appellants,

vs.

STATE OF ALABAMA,

Appellee.

APPEAL FROM THE SUPREME COURT OF
THE STATE OF ALABAMA

BRIEF FOR THE APPELLEE

This case comes before the court on appeal from the Supreme Court of Alabama and involves the levy of a franchise tax by the State on the appellant, Southern Natural Gas Corporation, which tax the appellant claims to be illegal because the property by which the tax was measured is asserted to have been used exclusively in interstate commerce. The assessment against the appellant for the amount of the tax was made by the State Tax Commission on the 13th day of May, 1931 (r. 14). An appeal was

taken to the Circuit Court of Montgomery County, in equity, from such assessment (r. 2). The Circuit Court of Montgomery County, by decree filed February 20, 1936, vacated and annulled said assessment (r., 50, 51). An appeal was taken by the State to the Supreme Court of Alabama (r. 52). The Supreme Court of Alabama by judgment rendered June 11, 1936 reversed and remanded said cause (r. 83).

The Southern Natural Gas Corporation applied for a re-hearing (r. 83). The Supreme Court of Alabama in answer to such application denied the same, but reversed and rendered the cause, rendering judgment for the amount of the assessment, with interest (r. 84).

The judgment on re-hearing appears on page 84 of the record. The opinion on re-hearing appears on page 82 of the record. The opinion of the court appears on pages 55 to 82, inclusive, of the record.

The final judgment on re-hearing is dated October 15, 1936.

QUESTIONS PRESENTED

The question presented to this court is this:

> "Is the assessment of the franchise tax against the Southern Natural Gas Corporation under the facts in this case, levied under the authority of Section 54 of Act No. 163, approved July 22, 1927, Alabama General Acts, 1927, page 176, as construed by the Supreme

Court of Alabama, void and unconstitutional as repugnant to Article I, Section 8, Clause 2, of the Constitution of the United States?"

No point was made below on the invalidity of the statute as such, but merely the invalidity of this particular assessment, and we do not presume that any other contention will be made in this court. As we understand it, the constitutionality of the Alabama franchise tax on foreign corporations has been upheld by this court and the only question before this court in the present case is the validity of the assessment and not the constitutionality of the law itself.

THE STATUTE INVOLVED

The statute upon the authority of which this tax was assessed is Section 54 of Act No. 163, approved July 22, 1927, General Acts of Alabama, 1927, page 176, which statute is as follows:

"Section 54. That every corporation organized under the laws of any other state, nation, or territory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of Two Dollars ($2.00) on each One Thousand Dollars of the actual amount of capital employed in this State. In ascertaining the annual franchise tax which shall be paid by any foreign corporation doing business in this State under this

section, there shall be deducted from the amount of the capital employed by such corporation in this State the aggregate amount of loans of money made by such corporations in this State, and which shall be secured by existing mortgage or mortgages to it on real estate in this State, and upon which mortgages there shall have been paid the recording privilege tax provided by law."

This statute is a reenactment of Section 11 of the Revenue Act of 1923 (General Acts, 1923, page 164, Section 11) as amended by Act approved September 13, 1923 (General Acts, 1923, page 266). The 1923 Act was a reenactment of Section 16 of the General Revenue Act of 1919 (General Acts, 1919, page 291, Section 16). This was reenactment of Clause 2 of Section 16 of the Revenue Act of 1915 (General Acts, 1915, page 297, Section 16). All of these Acts are almost identical except that the rate has been changed by the various Acts.

The 1915 Act was construed by the Supreme Court of Alabama in the case of Louisville & Nashville R. R. Co. v. The State, 201 Ala. 317; 78 So. 93; and the Act held constitutional. Certiorari was denied by this court. Louisville & Nashville R. R. Co. v. State of Alabama, 248 U. S. 533; 39 Sup. Ct. Rep., p. 18; 63 L. Ed. 406.

Alabama also levies a franchise tax on domestic corporations based on the actual amount of capital stock. This statute was construed by the Supreme Court of Alabama in the case of Kansas City, Mem-

phis & Birmingham R. R. Co. v. Stiles, 182 Ala. 138; 62 So. 734; and upheld by this court in an opinion appearing in 37 Sup. Ct. Rep., p. 58; 61 L. Ed. 176; 242 U. S. 111.

Both of the statutes levying a franchise tax on domestic and foreign corporations are legislative responses to the mandates of Sections 229 and 232 of the Constitution of 1901. These sections are as follows:

> "229. The legislature shall pass no special act conferring corporate powers, but it shall pass general laws under which corporations may be organized and corporate powers obtained, subject, nevertheless, to repeal at the will of the legislature; and shall pass general laws under which charters may be altered or amended. *The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of this state, which shall be in proportion to the amount of capital stock;* but strictly benevolent, educational, or religious corporations shall not be required to pay such a tax. The charter of any corporation shall be subject to amendment, alteration, or repeal under general laws.
>
> "232. No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of

its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. *The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State.* Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax." (Emphasis supplied.)

STATEMENT OF THE CASE

The theory of the appellant in this case as argued and presented in the court below is that the business of the corporation is exclusively interstate commerce. It is asserted that its business is that of transporting natural gas from the natural gas fields in Louisiana and Mississippi by pipe line for sale to its customers in Alabama, some of which is sold for re-sale and some of which is sold to consumers.

The argument is made that the business is exclusively interstate commerce and that all acts of the Corporation or things done by it or its agents are merely in aid of the interstate transportation and the business being interstate and the Corporation being a foreign corporation, the State is without power to levy a franchise tax on any basis whatsoever.

The State on the other hand maintains that the Corporation has sought and acquired a right to engage in any business that it may desire and which its charter authorizes, whether local or otherwise, and having sought and obtained a privilege greater than that necessary for mere interstate transportation, it has acquired a right which is within the power of the State to tax. The tax under this theory of the case is levied upon *the privilege of exercising corporate functions* within the State.

Second, the State maintains that the tax is not levied on the business of interstate transportation and is not a tax on the business or on the operations at all, but is levied on *the exercise of corporate functions* in the State; and that under either hypothesis, this tax under the facts is validly levied.

Third, the State maintains that the Corporation was engaged in some business of a local nature, affording the State the right to levy a franchise tax.

STATEMENT OF FACTS

The case was submitted under an agreed statement of facts (r. 15-49, inc.) of which pages 15 to 20, inclusive, constitute the statement of facts proper, and pages 20 to 49, inclusive, are copies of two contracts between appellant and the Alabama Natural Gas Corporation, and between appellant and the Tennessee Coal, Iron and Railroad Company, which are made exhibits to the agreed statement of facts and which must be considered "in

testing the correctness of the judgment rendered as a part of the statement of facts." These exhibits amplify and show in detail the manner in which the appellant's sales are made to the purchasers.

The agreed statement of facts (r., 15 et seq.) shows that the company is a Delaware corporation, organized prior to May 12, 1928, and that on May 12, 1928 it qualified to do business in the State of Alabama and filed a copy of its charter with the Secretary of State.

The stipulation, among other things, provided:

> "* * * The charter in brief authorized it to store, transport, buy and sell, oil gas, salt, brine, and other mineral solutions; to manufacture, acquire, distribute, use and sell artificial gas and to acquire, produce, use and sell the by-products and the residual products therefrom, and construct, maintain, operate, etc., all works necessary; to mine, produce, buy, acquire, use, sell, and distribute natural gas and its by-products and to acquire all works, equipment, and appurtenances necessary therefor; to produce, generate, buy, use and sell a mixture of artificial and natural gas, to distribute the same and to construct such ways and works as necessary therefor; to construct, lay, purchase, acquire, maintain, and operate, sell, encumber, or otherwise dispose of all necessary pipe lines, gas mains, plants and systems, for the use, sale and distribution of gas, over or under streets, alleys, etc., through private property and to

acquire the same by eminent domain; to acquire, manufacture and deal in ice. Also an elaborate enumeration of powers connected with and incidental to the foregoing businesses, including the right to sell stocks, bonds, etc.

"(2) On July 29, 1929, amendment to the charter was filed in the office of the Secretary of State further elaborating its powers and a like amendment was filed in the office of the Secretary of State on November 20, 1930.

"(3) From the date of the qualification of the Southern Natural Gas Corporation through and including the date of the assessment appealed from, the Corporation had been *qualified to do business as a corporation* in the State of Alabama and has had the *right to use* and enjoy all the *powers as authorized* by its charter; that it paid a permit fee annually and annually secured the right to *so* whatsoever it was *legally authorized to do* in the State of Alabama.

"(4) At the time of the assessment the corporation maintained its *office and chief place of business in the City of Birmingham, Alabama;* a majority of orders for gas were received by and cleared through the Birmingham office; all collections for sales were received and disbursements for expenses made or authorized at said office; *that the entire management, control and conduct of the business was conducted from said office;* the corporation owned and operated automobiles and motor

trucks which were used in the maintenance of its pipe lines; the corporation maintains a bank account and has offices and office equipment in Birmingham; *the contract under which gas is supplied by the corporation to the Birmingham Gas Company was made and approved in Birmingham;* the contract with the Alabama Utilities Service Company was made and executed by the officers of the corporation in Atlanta, Georgia, and the contract under which gas is supplied to the Tennessee Coal, Iron and Railroad Company was made and executed by the officers of the corporation in the City of New York.

"(5) That the subsidiary of the United States Steel Corporation hereinafter referred to is principally the Tennessee Coal, Iron and Railroad Company and other affiliated companies operating steel and industrial plants in the Birmingham district and which are *not public utilities* but which *consume the gas in their own right.*

"That the sales to the Tennessee Company and its affiliates are made *from time to time orders given by the Birmingham office* as the needs of such purchasers require;) that the gas purchased by these companies is transported into the State through the high pressure transmission system of Southern Natural Gas Corporation, which is made up of the main high pressure line and its numerous laterals, which

deliver natural gas to its various customers at the border line of their premises; (that in the sales to the Tennessee Company and its affiliates the pressure is *reduced at the point of delivery* for the accomodation of the purchaser to meet their needs and requirements.) The exact quantities of gas required by the corporation's customers in the State are purchased by the corporation from the producers in the Louisiana and Mississippi fields each day."

It further appears that beginning in, to-wit, May, 1929, construction of the pipe line for the transmission of natural gas from the Louisiana fields began, and by January 1, 1931 the property on which the tax was measured was in the State of Alabama.

It was likewise stipulated that from the outset the appellant has made use of its transmission line solely for the purpose of transmitting natural gas from the natural gas fields in Louisiana and Mississippi, and that appellant's business had been the transmission of said gas from the Louisiana and Mississippi fields for sale in the several States other than the State of Louisiana. It was further shown that on January 1, 1931 the appellant had entered into contracts with the Alabama Natural Gas Corporation, the Southern Cities Public Service Company, the Birmingham Gas Company, and subsidiaries of the United States Steel Corporation, to-wit, Tennessee Coal, Iron and Railroad Company and Universal Atlas Cement Company. The Alabama Natural Gas Corporation was a local distributor of

natural gas. The Southern Cities Public Service Company was the holding company owning three local gas distributing companies. The Birmingham Gas Company was a distributor. The Tennessee Coal, Iron and Railroad Company and the Universal Atlas Cement Company and associated companies, were not distributors, but were consumers, of gas.

It is stated on page 18 of the record as follows:

> "The gas sold to the said purchasers was gas delivered in continuous movement from the gas fields in Louisiana or Mississippi without break or interruption, to the point where it was delivered to and received by the purchaser, viz: the meter house at which the gas so sold was measured for the purpose of payment.
>
> "In cases of all deliveries made by appellant, the gas was moved under unregulated gas pressure, as produced by the natural pressure of the gas wells, to the designated points of delivery; in all cases in continuous flow from the Louisiana or Mississippi gas fields without cessation from the beginning of movement outside of the State of Alabama until delivery."

So far as the Tennessee Company is concerned, at least, these provisions must be read along with paragraph five of the stipulation above quoted and the provisions of the contract as shown by "Exhibit B." On page 40 of the record the contract set out provides in part:

"Seller shall supply and buyer agrees to take natural gas for use in its *Bessemer* rolling mill, its *Fairfield, Alabama* plant, and *Ensley, Alabama* plant (with the option to discontinue its use in the Ensley plant as hereinafter set forth) and for resale for industrial use only to the subsidiaries of the United States Steel Corporation in the Birmingham district to replace all fuel used in the above named plants of buyer and plants of the other subsidiaries of United States Steel Corporation" (with certain exceptions).

"Seller shall at its own expense provide in advance of the initial delivery date of March 1, 1930, *service lines of suitable size* to a point mutually agreed upon on the property of buyer's *Bessemer* plant. To reach buyer's *Fairfield* plant, seller shall provide a *service* line that will cross buyer's *Ensley* property and run in a southwesterly direction on the property of buyer to some point mutually agreed upon on buyer's *Fairfield* premises. Buyer agrees that it will make no charge for its right of way for any part of the service lines traversing its property. A suitable meter will be provided for metering the gas that may be used in the Bessemer plant, in the Ensley plant, and in the Fairfield plant of the buyer, and the plants of the *other subsidiaries.*" (Emphasis supplied.)

The opinion (r. 78) in commenting on this aspect of the facts, stated:

> "We know that this mill and these plants in the places named are widely separated."

It was further shown (r. 19) that pumping, stepping-up, or compressor stations were in course of construction on January 1, 1931 and were subsequently utilized, but had not been on that date.

The stipulation goes on to state that,

> "During the year 1931 appellant transacted and proposed to transact no business within the State of Alabama other than the business of selling, transmitting and delivering gas as aforesaid, and in the manner hereinbefore set out, or business incidental to or directly accessorial to such sale, transmission and delivery, and had no property in the State except as herein stated used in said business."

After stating that approximately 564 miles of pipe of varying diameter and various items of real and personal property were owned by appellant on January 1, 1931, it was stated on pages 19 and 20:

> "* * In the event that it should be lawfully held in this proceeding that all of appellant's property and assets located within the State of Alabama are to be held to constitute capital employed by appellant within the State of Alabama in the transaction of local business, with respect to which appellant was on the date of the assessment herein appealed from, subject to the assessment of a franchise tax as a for-

eign corporation transacting local business within the State of Alabama, it is agreed (solely for the purpose of this hearing) that the value of said property as of January 1 to May 13, 1931, was $5,500,000, appellant contending, however, that the facts above set out do not constitute the transaction of any local business whatsoever within the State subjecting appellant to a franchise tax under the laws of Alabama in respect thereof, also that, even if such business were subject to a franchise tax, it could not be validly levied in respect to that property used and held for use solely in making deliveries to said utilities or distributing companies or in transmitting gas through the State of Alabama into the State of Georgia.

"(10) It is further agreed that the part of appellant's said system and property used to any extent whatever by appellant in the sale or delivery of natural gas to the said subsidiaries of the United States Steel Corporation, as distinguished from the part or proportion of said property used solely in transmitting natural gas from the Louisiana-Mississippi fields through the State of Alabama into the State of Georgia, or for deliveries to the non-consumer utility or distributing companies above mentioned, may be determined as follows:

"(a) Proportion of value of system and property located in Alabama used in whole or in part in making delivery to United States

Steel Corporation subsidiaries.....46.8%.

"(b) Proportion of value of system and property located in Alabama east of points of delivery to United States Steel Corporation subsidiaries and not used in whole or in part in making deliveries to said United States Steel Corporation subsidiaries .....53.2%."

It is to be noted that the last quoted statement states the *contention of the appellant* and does not in any way constitute, and cannot in any way be construed as, a stipulation or admission either that the appellant is not liable for the franchise tax assessed under all the facts in the record, or that its liability therefor is dependent on the nature of the business operated; or that it is not doing some local business in the State of Alabama.

We wish to call the court's particular attention to these portions of the record emphasizing the contention made by the State that the Corporation had acquired the right of exercising corporate functions in Alabama and had likewise exercised such corporate functions.

On record page 16, it is stated:

"From the date of qualification, including the date of assessment, appellant had been qualified to do business as a corporation in the State of Alabama and *had the right to use and enjoy all of the powers as authorized by its charter;* that it paid a permit fee annually and annually *secured the right to do whatsoever it*

was legally authorized to do in the State of Alabama." (Emphasis supplied.)

"At the time of the assessment appellant *maintained its office and chief place of business in the City of Birmingham, Alabama.* A majority of orders for gas were received by and cleared *through the Birmingham office.* All collections for sales were received and disbursements for expenses were made or *authorized at said office;* that the *entire management, control and conduct of the business was conducted from said office;* that it owned and operated automobiles and motor trucks which were used in the maintenance of its pipe lines; that it maintained a *bank account* and had *offices and office equipment in Birmingham;* that the contract under which gas is supplied to the Birmingham Gas Company was *made and approved in Birmingham;* that the Tennessee Coal, Iron and Railroad Company and other affiliated companies are not public utilities, but consume gas in their own right. *The sales to the Tennessee Company and its affiliates are made from time to time orders given by the Birmingham office as the needs of the purchaser require;* that in the sales to the Tennessee Company and its affiliates, the pressure is reduced at the point of delivery for the accomodation of the purchaser to meet its needs and requirements."

On page 18 it is stated,

"The Tennessee Company and Universal Atlas Cement Company *purchased gas at their respective meter stations.*"

In "Exhibit A" (r. 29) it is stated:

"The buyer agrees to pay the seller at its *office in Birmingham, Alabama* for gas purchased."

On page 30 of the record it is stated: The seller shall

"* * use due diligence at all times to maintain a *reserve supply of natural gas* sufficient as to quality and quantity and delivered under pressure adequate fully to meet the needs of all the customers of the buyer hereunder."

On page 33 of the record it is provided that all notices given by buyer to seller shall be given by registered mail by delivering the same to seller at its *office at Birmingham, Alabama.*

On page 37 of the record, in referring to arbitration matters, it is provided that the judge of the District Court of the United States having jurisdiction of the *Southern District of Alabama* shall appoint one of the arbitrators.

In "Exhibit B" (r., 47) it is stated:

"Buyer agrees to pay seller for natural gas delivered hereunder beginning with date upon

which deliveries of gas shall first be made, payment to be made at the *office of seller, Watts Building, Birmingham, Alabama*, on or before the 15th day of the month for natural gas deliveries during the preceding month." (Emphasis supplied.)

The statement of facts, which we have summarized, is also quoted at length in the opinion of the Supreme Court of Alabama and the pertinent portions discussed.

SUMMARY OF ARGUMENT

I.

The franchise tax here exacted is laid on the exercise of corporate functions, or on the privilege of exercising corporate functions.

Beard v. Union & American Pub. Co., 71 Ala. 60.

Sullivan v. Sullivan Timber Co., 103 Ala. 371; 15 So. 941.

Farrior v. New England Securities Co., 88 Ala. 275; 7 So. 200.

New England Mortgage Security Co. v. Ingram, 91 Ala. 337; 9 So. 140.

Nelms v. Edinburg American Land Mtg. Co., 92 Ala. 157; 9 So. 141.

Detroit International Bridge Corp. v. Corporation Tax Appeal Board, 287 U. S. 295; 53 Sup. Ct. 137; 77 L. Ed. 314.

Michigan v. Michigan Trust Co., 286 U. S. 334; 52 Sup. Ct. 512. 76 L. Ed. 1136.

State v. Bradley, 207 Ala. 677; 93 So. 595.

Investors Syndicate v. State, 149 So. 83; 227 Ala. 216.

State v. Anglo Chilean Nitrate Sales Corp., 142 So. 87; 225 Ala. 141.

Dissenting opinion of Mr. Justice Cardozo, 288 U. S. 218; 53 Sup. Ct. 373; 77 L. Ed. 710.

Muller Mfg. Co. v. First Nat'l. Bank of Dothan, 176 Ala. 229; 57 So. 762.

State v. Southern Natural Gas Corporation (r. 79), 170 So. 178.

II.

"Doing business" as used in Section 54 and Section 232 of the Constitution means the right or privilege of exercising corporate functions, or the exercise of corporate functions in the State of Alabama.

Authorities cited under I, supra.

III.

The privilege of exercising the corporate franchise is the legitimate object of the State's power to tax.

Educational Films v. Ward, 282 U. S. 379; 51 Sup. Ct. 170; 75 L. Ed. 400; 71 A. L. R. 1226.

Postal Telegraph Co. v. Adams, 155 U. S. 688; 15 Sup. Ct. 268; 39 L. Ed. 311.

St. L. & S.W. R.R. v. Arkansas, 235 U. S. 350; 35 Sup. Ct. 99; 59 L. Ed. 265.

Atlantic Lbr. Co. v. Commission of Corporations of Mass., 298 U. S. 553; 56 Sup. Ct. 887.

Champion Copper Company and Copper Range Company, decided in Cheney Bros. Co. v. Mass., 246 U. S. 147, at p. 155; 38 Sup. Ct. 295; 62 L. Ed. 632.

K.C.F.S. & M.R. Co., v. Botkin, 240 U. S. 227; 36 Sup. Ct. 261; 60 L. Ed. 617.

Home Ins. Co. v. New York, 134 U. S. 594.

Horn Silver Mining Co. v. New York, 143 U.S. 305.

Flint v. Stone Tracy Co., 220 U. S. 107.

Anglo Chilean Nitrate Sales Corp. v. State of Alabama, 288 U. S. 218 (Dissenting opinion).

Ashley v. Ryan, 153 U. S. 436; 14 S. Ct. 865; 38 L. Ed. 773.

K. C. M. & B. Ry. Co. v. Stiles, 242 U. S. 111; 37 Sup. Ct. 58; 61 L. Ed. 176. Affirming 182 Ala. 138; 62 So. 734.

IV.

The exercise of corporate functions is the legitimate object of the State's power to tax.

Authorities cited under III, supra.

V.

The appellant sought and obtained the privilege of exercising corporate functions in the State of Alabama.

State v. Southern Natural Gas Corporation (opinion, r. 56).

Agreed statement of facts (r., 15, 16).

Detroit International Bridge Corp. v. Corporation Tax.

Appeal Board, 287 U. S. 295, 53 Sup. Ct. 137, 77 L. Ed. 314.

VI.

The appellant had not only sought the privilege of exercising corporate functions in Alabama, but had actually exercised such corporate functions.

Atlantic Lbr. Co. v. Commissioner of Corporations, supra.

Copper Range case, supra.

Champion Copper Company case, supra.

State v. Southern Natural Gas Corporation (opinion r. 55-82).

Kansas v. Independence Gas Co., 99 Kan. 671; 163 P. 148; L. R. A. 1917-D 1070.

Attorney General v. Bay State Mining Co., 99 Mass. 148; 96 Am. Dec. 717.

People v. Glynn, 125 N. Y. App. Div. 328; 109 N. Y. Supp. 868.

Commonwealth v. Wilkes Barre & H. R. Co., 251 Pa. 6-11; 95 Atl. 915;

R. I. Hospital v. Rhodes, 37 R. I. 141-159; 91 Atl. 50.

Alabama Western Ry. Co. v. Tally Bates Co. 162 Ala. 396 (50 So. 341).

VII.

The tax in this case is not levied on interstate commerce or on the receipts therefrom, but is on the right or privilege of exercising corporate functions or the exercise of corporate functions in Alabama.

State v. Southern Natural Gas Corporation, supra (r. 79).

Authorities cited under I, supra.

VIII.

The tax is a corporate franchise tax and not a license tax upon the business conducted by the corporation.

Authorities cited under I and VII, supra.

IX.

The tax is not on the property, but the property in Alabama is the measurement of the tax. A tax otherwise valid may be measured by property used in interstate commerce.

Authorities cited under I, supra.

X.

So far as corporate rights and powers are concerned, appellant had the right and enjoyment in Ala-

bama of all rights and powers which a domestic corporation may enjoy, and used such corporate powers in the same manner as a domestic corporation engaged in the same business would have been authorized to do.

XI.

Under the facts shown by the record, appellant was not engaged exclusively in interstate commerce.

Atlantic Lbr. Co. v. Commissioner of Corporations, supra.

Copper Range case, supra.

Champion Copper Company case, supra.

Kansas v. Independence Gas Co., 99 Kan. 671; 163 P. 148; L.R.A. 1917-D 1070.

Attorney General v. Bay State Mining Co., 99 Mass. 148; 96 Am. Dec. 717.

R. I. Hospital v. Rhodes, 37 R. I. 141, 169; 91 Atl. 50.

Commonwealth v. Wilkes Barre & H. R. Co. 251 Pac. 6-11; 95 Atl. 915.

People v. Glynn, 125 N. Y. App. Div. 328; 109 N. Y. Supp. 868.

I.

THE FRANCHISE TAX HERE EXACTED IS LAID ON THE EXERCISE OF CORPORATE FUNCTIONS OR THE PRIVILEGE OF EXERCISING CORPORATE FUNCTIONS

The position of the State in this case is that the right and privilege of exercising corporate functions in the State is a part of the property of the corporation and is subject to State taxation even though the business actually conducted may not be subject to State regulation.

> "The franchise of a corporation although that franchise is the business of interstate commerce, is as a part of its property subject to State taxation, provided at least the franchise is not derived from the United States."
>
> Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 163; 47 L. Ed. 995, at page 999.

Under the facts shown in the record, appellant applied for and secured the right to exercise in the State of Alabama all the powers authorized by its charter, which powers and functions are plenary in their scope and many of which are not connected with, or at least could be carried on independently of,

interstate commerce. They are in brief such as nominally belong to any corporation, whether domestic or foreign.

The record shows, however, that appellant went much further than merely securing the right to do these things, but actually exercised such corporate functions in the State. It established its chief office and place of business in Alabama, where "*the entire management, control and conduct of the business was conducted*" (r. 16). (Emphasis ours.)

The statute here involved was before this court in the case of Louisville & Nashville R. R. Co. v. State, supra, in which certiorari was denied, and in Anglo Chilean Nitrate Corporation v. The State, supra.

The statute levying the corresponding tax on domestic corporation was before this court in Kansas, Memphis & B'ham. Ry. Co. v. State of Alabama, supra, in which an opinion was written and the statute upheld; and again in Atlantic Coast Line Ry. Co. v. Alabama, 253 U. S. 489; 40 Sup. Ct. 485; 64 L. Ed. 1027; denying writ of certiorari to the case of The State v. Atlantic Coast Line Ry. Co., 202 Ala. 558; 81 So., p. 60.

In the Anglo Chilean case the tax was held invalid as an attempt to tax imports in the original packages. As we read and construe the opinion of the majority, it was based on the construction which this court concluded had been given to the statute by the Supreme Court of Alabama. The minority opinion decided that the Supreme Court of Alabama

had given a different interpretation to the statute. We do not understand the majority opinion as denying the correctness of the minority opinion, but only a denial of the hypothesis upon which it was based.

With this situation, the interpretation of the statute was squarely presented to the Supreme Court of Alabama in the present case and the various underlying decisions of the court both prior to and since the adoption of the constitutional provision (Sec. 232) were cited, and the court was asked to clarify, and has clarified, the interpretation of the statute as shown in the elaborate opinion appearing in the record. On the particular interpretation of the statute, the court said:

> "The provisions for a franchise tax required to be levied on domestic and foreign corporations are stated in Sections 229 and 232 of the Constitution. In State v. Bradley, 207 Ala. 677; 93 So. 595, dealing with domestic corporations, it was declared: 'The subject of the creator's imposition of this "franchise tax" is the existence of the corporation, not the "continued exercise of the corporate franchise." (Citing cases.) A domestic corporation not excepted by the Constitution cannot avoid or escape this "franchise tax" by even complete corporate inactivity.' That is, a domestic corporation, taxed upon its mere existence, pay a franchise tax on its capital stock, etc.—Detroit International Bridge Co. v. Corporation Tax Appeal Board of Michigan, 287 U. S. 295.

"By Section 232 of the Constitution the Legislature is required to levy a franchise tax on foreign corporations qualifying to do business in the State. The policy of the State as to domestic and foreign corporations is uniform as far as possible; hence the franchise tax on foreign corporations is levied upon the right to do business. This is stated by Mr. Justice Bouldin in Investors' Syndicate v. State, 227 Ala. 216; 149 So. 83, saying: 'The franchise tax is *for the privilege of exercising corporate functions*, and measured by the capital employed in Alabama.' Domestic and foreign corporations qualifying enjoy the same powers, protection and advantages under the law." (R., 65-66.)

After citing certain cases, the court states:

"* * * the decisions are to the effect that the tax is 'laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals;' that 'it is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods, which may be the same, whether done by corporations or individuals.' (Citing.) R. 66.)

"The franchise tax required to be levied on foreign corporations as a prerogative to the right of exercise of its corporate functions in the State, is stated in Section 232 of the Constitution and the statutes.—Acts 1927, page

176, Sec. 54. The holding of this court is, that the initial requirement of a privilege or franchise tax is *for the* right to do business in the State (citing); and as to this, it has been uniformly held that one act of business before qualification is sufficient to subject to the penalties imposed against foreign corporations doing business without a permit." (R. 66-67.)

After discussing at length the case of State v. Nat'l. Cash Credit Ass'n., 224 Ala. 629; 141 So. 541, including quotations from the opinion of this court in the *Anglo Chilean* case, the court continued:

"The effect of the holding in State v. National Cash Credit Ass'n., 224 Ala. 629; 141 So. 541, is not a departure from the long line of our decisions, but merely a definition of the term 'capital employed in this State' by foreign corporations within the purview of our cases dealing with the provisions of our Constitution. The mere fact that a distinct and domestic corporation is engaged in a like business in the State, though the latter may be a subsidiary of the foreign corporation, does not justify double taxation by way of an exaction of a franchise tax from the foreign corporation, based solely upon its holding of the stock of the subsidiary." (R. 73.)

The court further said (r. 79):

"While counsel for appellee (appellant here) argue that whatever is done in Alabama is in-

cidental to transportation of natural gas in interstate commerce from points without the State, we hold that the franchise tax here exacted and being considered is not on any basis a *tax on business* or a *burden on the corporation's interstate commerce*, but *is laid on the exercise of corporate functions*, or on the *privilege of exercising corporate functions within the State* and its employment of its capital in Alabama, domiciled at its office in Birmingham within this State. The control of the business in all of its aspects was in Birmingham, as shown by the statement of facts." (Emphasis supplied.)

This being the last pronouncement of the Supreme Court of Alabama, is decisive, we respectfully submit, of the meaning and construction to be given the statute and any expressions apparently contrary previously made are not any longer to be considered. Especially is this true in view of the fact that the question was presented directly and emphatically in this case. We submit that the opinion of the court concludes any argument that might be submitted or any inference that might be drawn from the *National Cash Credit Association* case, supra, that the tax is other than a corporate franchise tax levied on the exercise of corporate functions in Alabama or on the privilege of exercising such corporate functions.

It is particularly to be noted that Justice Bouldin, who wrote the opinion in the National Cash Credit Association case also wrote the subsequent opinion in Investor's Syndicate v. The State, supra, in which he stated:

> "The franchise tax is for the *privilege of exercising corporate functions* and measured by the capital employed in Alabama." (Emphasis supplied.)

While the opinion quotes and cites from numerous cases, most of which are cited by Mr. Justice Cardozo in the dissenting opinion in the Anglo Chilean Nitrate case, supra, we wish briefly to quote from and comment on certain of the cases construing previous statutes and particularly those arising under Section 232 of the Constitution.

In Beard v. Union and American Publishing Company, 71 Ala. 60; it was declared:

> "There must be a doing of some of the works or *an exercise of some of the functions for which the corporation was created* to bring the case within that clause. A railroad, bank, or insurance company of foreign corporation performing its corporate functions within the limits of Alabama, would be required to keep at least one known place of business and an authorized agent or agents in this State. That would be doing business; the business or a part of it which falls directly within the purview of the corporate power."

Certainly this corporation exercised some of the functions for which it was created. In fact, as we read the record, it was using in the State of Alabama any and all corporate powers and functions which it desired and these were done in a corporate

capacity. The business which the corporation conducted was incidental to such corporate powers rather than as asserted, were the corporate powers and functions incidental to the business.

II.

"DOING BUSINESS" AS USED IN SECTION 54 AND SECTION 232 OF THE CONSTITUTION MEANS THE RIGHT OR PRIVILEGE OF EXERCISING CORPORATE FUNCTIONS OR THE EXERCISE OF CORPORATE FUNCTIONS IN THE STATE OF ALABAMA

The Beard case, supra, was quoted at length with approval in Sullivan v. Sullivan Timber Company, 103 Ala. 371, and Section 232 was particularly discussed. We quote briefly:

> "The succeeding clause declares that '*such corporation*,' by which we understand not any and every foreign corporation, but the corporation which has designated for itself 'a known place of business and an authorized agent or agents therein,' may be sued in any county where it does business."

This provision of Section 232 as construed in the Sullivan case, must by parity of reasoning be continued to the last clause of Section 232, which provides:

> "The Legislature shall by general law provide for the payment to the State of Alabama of a franchise tax by *such corporation*, but such franchise tax shall be based on the actual amount of capital employed in the State."

The previous clause had provided that no foreign corporation shall do any business without qualifying. The second clause stated that such corporation may be sued and this is the clause quoted in the Sullivan case and held to mean the qualifying corporation. By the third paragraph the Legislature was required to levy a franchise tax on *such corporation.*

Patently "doing business" as used in the franchise provision has the same connotation as when used in the qualifying provision. The use of the word "such" in each paragraph shows clearly the intent of the makers of the Constitution.

The question was discussed in Farrior v. New England Mortgage Security Company, 88 Alabama 275, in which it was said:

> "The bill alleges that the complainant corporation under its charter and laws of incorporation, had full power and authority to loan the money and take the mortgage in controversy. In engaging in such a transaction, the complainant was in the exercise of its chief corporate function as imported by its very name and as admitted by the bill. The prohibition of the Constitution is against doing any business in

this State without compliance with the conditions specified. The doing of a single act of business, if it be in the exercise of a corporate function, is as much prohibited as the doing of a hundred such acts."

As was pointed out by Justice Cardozo, with ample citation of authorities, these constitutional provisions have never applied nor ever have sought to be applied to corporations doing a purely interstate or foreign commerce business. Corporations so engaged need not qualify, for they enjoyed full protection under the Federal Constitution and the State has disclaimed any desire to compel a corporation, whose only functions are purely interstate, to qualify. It had, though, required those exercising corporate functions in Alabama to qualify and required every "*such corporation*" to name a statutory agent and required the Legislature to levy a franchise tax on every "*such* corporation." We take it, therefore, that when a corporation qualifies, it thereby admits that it is exercising its corporate functions in Alabama, or else seeks the right and privilege of so doing.

It is apparent, we think, that the decisions cited by Justice Thomas and the opinion in this case conclusive to the effect that "doing business" as used in Section 232 of the Constitution and in the Act under which this tax was levied, clearly mean the exercise of corporate functions in this State or obtaining "the privilege at its own unfettered will, of exercising corporate functions," and that such a corporation is subject to a franchise tax.

III.

THE PRIVILEGE OF EXERCISING A CORPORATE FRANCHISE TAX IS THE LEGITIMATE OBJECT OF THE STATE'S POWER TO TAX.

IV.

THE EXERCISE OF CORPORATE FUNCTIONS IS A LEGITIMATE OBJECT OF THE STATE'S POWER TO TAX.

V.

THE APPELLANT SOUGHT AND OBTAINED THE PRIVILEGE OF EXERCISING CORPORATE FUNCTIONS IN ALABAMA.

VI.

THE APPELLANT HAD NOT ONLY SOUGHT THE PRIVILEGE OF EXERCISING CORPORATE FUNCTIONS IN ALABAMA, BUT HAD ACTUALLY EXERCISED SUCH CORPORATE FUNCTIONS.

We are grouping Propositions III and IV together because the cases which support the one likewise support the other. We group V and VI because as we interpret the facts in the present case, the appellant had acquired not only the right and the privi-

lege of exercising corporate functions in the State, but has also exercised such right and privilege, and the facts can be more conveniently applied along with the statements of the law.

In Educational Films Corporation v. Ward, supra, this court said:

> "*Under the Constitution the privilege of exercising the corporate franchise is the legitimate object*, and the immunity of federal instrumentalities from taxation, a legitimate restriction, of the *state power to tax*. To give both to the power and to the immunity such a practical construction as will not unduly restrict the power of the government imposing the tax, or the exercise of the functions of the government which may be affected by it, is the problem necessarily involved in determining the extent of the immunity. See Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384. So far as it concerns the power of a state to impose a tax on corporate franchises, the problem has long since ceased to be novel. While this court, since McCulloch v. Maryland, 4 Wheat, 316 4 L. Ed. 579, has consistently held that the instrumentalities of either government, or the income derived from them, may not be made the direct object of taxation by the other, Weston v. City Council of Charleston, 2 Pet. 449, 7 L. Ed. 481; Federal Land Bank v. Crosland, 261 U. S. 374; it has held with like consistency that the privilege of exercising the corporate franchise is no less an

appropriate object of taxation by one government merely because the corporate property or net income, which is made the measure of the tax, may chance to include the obligations of the other, or the income derived from them. The constitutional power of one government to reach this permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon the other.

"The precise question now presented was definitely answered in Flint v. Stonce Tracy Co., 220 U. S. 107, 162, et sep., 31 S. Ct. 342, 55 L. Ed. 39, Ann. Cas. 1912B, 1913, which upheld a federal tax, levied upon a corporate franchise granted by a State, but measured by the entire corporate income, including, in that case, income from tax exempt municipal bonds. In reaching this conclusion, the court reaffirmed the distinction, repeatedly made in earlier decisions, between a tax, invalid because laid directly on governmental instrumentalities or income derived from them and an excise which is valid *because imposed on corporate franchises*, even though the *corporate property* or income which is the measure of the tax embraces tax exempt securities or their incomes." (Emphasis supplied.)

While this case concerns particularly the right to include in the measurement of the corporate franchise tax income received from governmental obligations, yet the opening sentence declares without

restriction that the "privilege of exercising the corporate franchise is the legitimate object of the State power to tax."

> "* * The right and privilege of exercising corporate functions in the State is a part of the property of the corporation and is subject to State taxation, even though the business actually conducted may not be subject to State regulation."
>
> A & P Telegraph Co. v. Philadelphia, 190 U. S. 163; 47 L. Ed. 995.

Under the facts shown in the record, appellant applied for and secured the right to exercise in the State of Alabama all the powers authorized by its charter, which powers and functions are plenary in their scope, and many of which are not connected with, or at least could be carried on independently of, interstate commerce. They are such as normally belong to any corporation, domestic or foreign.

In Home Insurance Co. v. New York, 134 U. S. 594; 10 Sup. Ct. 593; 33 L. Ed. 1025, this court stated:

> "The Statute designates it a tax upon the 'corporate franchise or business' of the Company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

"By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its Legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or *a sum to be ascertained in any convenient mode which it may prescribe.* The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which

it will exact for the franchise. No constitutional objection lies in the way of a legislative body *prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows.*'

"* * * 'It must be regarded as a sound doctrine that the State, in granting a franchise to a corporation, may limit the powers to be exercised under it and annex conditions to its enjoyment, and make it contribute to the revenues of the State. If the *grantee accepts the boon it must bear the burden.*'

"This doctrine of the taxability of the franchises of a corporation without reference to the character of the property in which its capital stock or its deposits are invested is sustained by the judgments in Society for Savings v. Coite and Provident Institution v. Massachusetts, which were before this court at the December Term, 1867, 73 U. S. 6 Wall. 594, 611 (18:897, 907)." (Emphasis supplied.)

In Postal Telegraph Cable Co. v. Adams, 155 U. S. 688; 16 S. Ct. 268; 39 L. Ed. 311, the court, speaking through Chief Justice Fuller, said:

"It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to

a regulation of such commerce and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment.

"As pointed out by Mr. Justice Field in Horn Silver Min. Co. v. New York, 143 U. S. 305 (36: 164), 4 Inters. Com. Rep. 57, the right of a state to tax the franchise or privilege of being a corporation, as personal property, has been repeatedly recognized by this court, and this whether the corporation be domestic or a foreign corporation doing business by its permission within the state. But a state cannot exclude from its limits a corporation engaged

in interstate or foreign commerce, or a corporation in the employment of the general government, either directly in terms or indirectly by the imposition of inadmissible conditions. Nevertheless the state may subject it to such property taxation as only incidentally affects its occupation, as all business, whether of individuals or corporations, is affected by common governmental burdens. Ashley V. Ryan, 153 U. S. 436 (38: 773), 4 Inters. Com. Rep. 664, and cases cited.

"Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce, but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

In St. Louis S. W. R. Co. v. Arkansas, etc., 235 U. S. 350; 59 L. Ed. 351, in commenting upon the foregoing quotation from Postal Telegraph, this court said:

"Reference is made to an extract from the opinion in the Adams Case, 155 U. S. 696, where the court said: 'Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use; and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attach as inconsistent with the Constitution. Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 445, 38 L. Ed. 1041, 1046, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122.' This, however, does not mean, as is contended, that because of the 14th Amendment a state may not, in addition to the imposition of an ordinary property tax upon an instrumentality of interstate or international commerce, *impose a franchise tax ascertained by reference to the property of the corporation within the state, including that employed in interstate commerce.* The court was dealing only with the commerce clause, and the language quoted means that, by whatever name the tax *or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in in-*

terstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack; and that it is permissible to value the property at what it is worth in view of its use in interstate commerce, so long as no added burden is imposed as a condition of such use. This is evident from a reading of the context from the reference made to the opinion in 154 U. S. at p. 445." (Emphasis supplied.)

In Ashley v. Ryan, 153 U. S. 436; 38 L. Ed. 773; 14 S. Ct. 865, it was said:

"* * 'At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one state, their corporate powers and franchise could be exercised in other states without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those states would soon pass into their hands. The principal business of every state, would, in fact, be controlled by corporations created in other states.'

"It follows from these principles that a state, in granting a corporate privilege to its own citizens, or what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have obtained. In Paul v. Virginia, supra, the court said: 'Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest.'"

While the facts in this case are somewhat different, the foreign corporation, as in the case of K. C. & M. B. Ry. v. Stiles, supra, having consolidated with a domestic corporation, we submit the principle is applicable. True it is, that a State may not exclude a corporation engaged in interstate commerce or burden such interstate commerce, but when a foreign corporation seeks and obtains a right much greater than necessary to carry on interstate com-

merce, we submit the principle becomes immediately applicable. *This is emphatically true, we submit, when the corporation transfers the seat of its corporate government* to a State other than that of its creation and uses and enjoys the *services of such State as fully* and completely as if originally there chartered.

In Kansas City F. S. & M. R. Co. v. Botkin, 240 U. S. 236; 60 L. Ed. 621; 36 Sup. Ct. 263, this court upheld a franchise tax on domestic corporations measured by its entire capital stock. It was there claimed the tax constituted a burden on interstate commerce.

In Kansas City, etc. R. R. Co. v. Stiles, 242 U. S. 111, at p. 119, it was stated:

> "So of the objection that the tax imposes a burden upon interstate commerce, the test of validity recognized in previous cases and repeated in Kansas City &c. Railway Co. v. Kansas, supra, *is the nature and character of the tax imposed.* The State may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, *measured by capital* in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. In the present case, the franchise tax is imposed upon the capital stock of a corporation consolidated un-

der the law, and engaged in both interstate and intrastate commerce.

"We find nothing in the amount or character of the tax which makes it a burden upon interstate commerce, and so beyond the authority of the State to impose." (Emphasis supplied).

While the tax in that case was on a corporation created by the consolidation of a foreign and domestic corporation, measured by the capital stock, we submit that a tax measured by the *capital* itself employed within the State is even less objectionable. The tax under the Alabama law on domestic and foreign corporation while slightly differently framed, is under the decision of the Supreme Court in this case based essentially upon the same rights and principles. Can it be said that this corporation, enjoying or having the right to enjoy as it does all the powers and functions of a domestic corporation, can avoid a corresponding liability because its original charter happened to be granted by Delaware? That, as we see it, is the essence of the difference. It is not the nature of the business, because in either case the tax is not on the business, nor measured by it, nor dependent upon its nature. Liability, appellant would have us believe, is almost solely dependent on whether a corporation is initially chartered in Alabama.

In the case of Detroit International Bridge Corporation v. Corporation Tax Appeal Board, supra, and Michigan v. Michigan Trust Company, the State

of Michigan levied a franchise tax on both domestic and foreign corporations for "*the privilege* of exercising its franchise in the State." As quoted in Detroit Bridge case, and the Michigan Trust Case, the statute was as follows:

> "* * every corporation (excepting certain companies that need not be named), organized or doing business under the laws of the state 'shall * * * for the privilege of exercising its franchise and of transacting its business within this state, pay to the secretary of state an annual fee of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars. It is the intent of this section to impose the tax herein provided for upon every corporation, *foreign or domestic, having the privilege of exercising corporate franchises within this state,* irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period.'" (Emphasis supplied.)

The Supreme Court of Michigan had held that the tax was upon the "right to transact." With this construction, this court upheld a franchise tax assessed against the Bridge Company, which operated the International Bridge between Michigan and Ontario, against the claim that the corporation was engaged exclusively in foreign commerce. The opinion stated:

"We do not consider whether appellant is engaged in foreign commerce, for we are of the opinion that it has failed to establish that it has no power to carry on any business that is not within the protection of the commerce clause. **

"*Appellant has the burden to establish the facts on which it asserts* the invalidity of the statute." (Emphasis supplied.)

It was further stated:

"* * The record contains only a part of the third article of its articles of association: 'The purpose or purposes of this corporation are as follows: To construct, own and/or operate a highway bridge across the Detroit River from Detroit, Michigan, to Sandwich Province of Ontario, Canada, and the approaches thereto; to maintain and operate such bridge and the approaches thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use.'

"Appellant asserts that its powers are solely limited to these purposes. But appellee in its brief brings forward the entire article, containing in its final paragraph a specification of power that is not limited, incident, or appurtenant to the authority to construct, maintain, and operate the bridge: 'This corporation may maintain offices or agencies, conduct its business or any part thereof, purchase, lease or otherwise acquire, hold, mortgage, convey and assign real or personal property, and do all or

> any of the acts herein set forth, outside of the State of Michigan as well as within said State.' It is clear that, in addition to general power to own and operate the bridge and to do all that is related to that enterprise, appellant is by the last-quoted provision empowered, as contended by appellee, to carry on the business of buying and selling real and personal property within the state of Michigan and elsewhere."

This case involved a domestic corporation it is true, but the statute, which it construed, levied the same burden on both *domestic* and *foreign* corporations. We therefore take it that the same construction would be applied to a foreign corporation under the same facts. Otherwise the statute would be discriminatory.

The majority opinion in the Anglo Chilean case stated:

> "The Alabama statute is unlike that of Michigan examined here in Detroit International Bridge Company v. Corporation Tax Appeal Board."

Taking the construction which this court did from State v. National Cash Credit Association, this statement was unquestionably correct.

We submit, however, that since the opinion in the present case, such construction can no longer be given, but that now the Supreme Court of Alabama has definitely stated:

"The franchise tax is for the *privilege of exercising corporate functions*" (r. 66),

and again,

"The franchise tax required to be levied on foreign corporations as a prerogative to the *right of exercise* of its corporate functions is stated in Section 232 of the Constitution and the Statutes (Acts 1927, p. 176, Sec. 54.) The holding of this court is that the initial requirement of a privilege or franchise tax is for the right to do business in the State." (R. 66.)

Applying this rule to the facts, the court said:

"By its action (appellant) in two respects to be indicated obtained a franchise *to do a local business* within the State, *in addition to such rights as it had* under the Federal Constitution to conduct its interstate business and its product from Louisiana and Mississippi to and through Alabama, and *to sell the same at retail* to consumers here on the one hand, and to their subsidiaries on the other."

The court quoted at length from the dissenting opinion of Mr. Justice Cardozo in the Anglo Chilean Nitrate Sales Corporation case upholding the competence of the State to tax "this franchise or privilege, this grant of benefits beyond any conferred by the Federal Constitution."

The construction given the statute and constitutional provisions by Mr. Justice Cardozo is fully

sustained by the opinion of the Supreme Court of Alabama.

The statute as thus construed is so closely similar to the Michigan statute discussed in the Detroit International Bridge case as to be almost identical.

Therefore the only difference is that in the case before the court, the corporation involved had originally been chartered in Delaware, and technically was a foreign corporation. The Michigan statute applied both to domestic and foreign corporations, and presumably if good as to one, was also good as to the other.

We submit that the Detroit Bridge case is highly persuasive of the position which we maintain, both on the basis of the statute, its construction, and the charter powers as set out in the opinion.

May we summarize and compare:

The Michigan statute levies a tax on "every corporation *foreign* or domestic, having the *privilege of exercising corporate functions* within this State, *irrespective* of whether any such corporation chooses to *actually exercise* such privilege during such taxable period."

The statute by its terms applies uniformly on both domestic and foreign corporations. A charge is made for exactly the same privilege. Michigan under this statute does not levy a tax on domestic corporations for the right of being a corporation,

but the tax is on "the privilege of exercising corporate functions." The same tax is levied on foreign corporations.

The Bridge Company claimed that it was engaged exclusively in international commerce. This court, however, without deciding that question definitely but, as we interpret the opinion, assuming the claim to be a fact, deemed it unimportant, because the corporation "has failed to establish that it has *no power* to carry on any business that is not within the protection of the commerce clause," and after quoting the charter powers, concluded:

> "It is clear that in addition to general power to own and operate the bridge and to do all that related to that enterprise, appellant is, by the last quoted provision *empowered*, * * to *carry on the business* of *buying and selling real and personal property* within the State of Michigan and elsewhere." (Emphasis supplied.)

The statute was sustained as we read, not because of what the corporation *did*, but because of *what it had a right to do.*

Under the Michigan statute, levying as it does the same tax on the same privilege, can the rule be any different when applied to a foreign corporation, operating an international bridge, but having the *right* to "carry on the business of buying and selling real estate"?

If equal protection be guaranteed, the same construction would apparently have to apply. Logic would seem to demand it.

Applying the rule and reason of the Detroit Bridge case to the present case, we find,

(1) That the tax is laid on the privilege of exercising corporate functions in both statutes;

(2) That the tax in the Detroit case was upheld because the corporation was *empowered* to carry on functions other than foreign commerce, specifically a real estate business;

(3) That appellant here is empowered in Alabama to "store * * oil, gas, salt, brine and other mineral solutions"—clearly local functions: "to *manufacture* * * artificial gas." Manufacturing, even though the transportation follows almost instantaneously, is local. Utah Power & Light Co. v. Pfost, 286 U. S. 165; 52 Sup. Ct. 548. "To *produce* and sell the by-products and residual products therefrom"—again a manufacturing and hence a local process. "To produce, generate * * mixture of artificial and natural gas," to "manufacture and deal in *ice*," and "to sell stocks and bonds." These last powers are not directly or indirectly connected with the interstate transportation of gas or even the gas business. In addition, none of the numerous powers relating to the gas business are in any way limited to interstate matters, but the authority and *power* as to all is unlimited.

This corporation while a foreign corporation, had far greater powers in Alabama than did the Detroit Bridge Company in Michigan, as disclosed in the opinion. Further, there is, unlike that of the Detroit Company, nothing in appellant's charter suggesting that its purposes are interstate. The powers sought and obtained are by their words and by their *very nature*, local.

The question of what constitutes the exercise of corporate functions in a State is not in all cases clear. Generally it means the "doing of some of the works or an exercise of some of the functions for which the corporation was created." Beard v. Union and American Publishing Company, supra. Also 37 R. I. 141; 159 91 A 50.

The appellant here was created to exercise and enjoy the widest powers, and for the right to exercise, and the exercise of, it applied to and received from the State of Alabama all the authority authorized by its charter and the amendments thereto. This grant of charter powers was not limited to interstate commerce, but as above pointed out afforded it the right of engaging in numerous avocations.

The charter was taken out in the State of Delaware. So far, however, as the record shows it has never functioned in Delaware. To the contrary, we contend its corporate powers were transferred to the State of Alabama, and Alabama became the seat of corporate government, where the corporation as a corporation, functioned and carried on its manifold activities.

We submit that it is a sound principle to assert, that a corporation may function as such, dissociated in a manner from the business or businesses it may happen to operate. There are directors' meetings, issuance of bonds, borrowing of money, paying dividends, making income and other tax returns, the keeping of corporate books and records, the acceptance and approval or rejection of orders, the maintenance of its chief office, and, above all, the exercise of *control* of all policies, plans and details of corporate management and the carrying on of the business or businesses in which it may be engaged, all of which relate to the corporation as an entity and which are superior to and in a measure at least independent of the business which the corporation engages in.

In the present case, the appellant established and maintained its office and *chief place of business* in Birmingham. "Here is the home office fixed. A majority of orders for gas were *received by* and *cleared through* the Birmingham office." A daily supervision by the corporate officers is manifestly in Birmingham. "All collections for sales were received and disbursements for expenses made or *authorized* at said office." This embraces a complete financial control. These expenses included or could have included appearances before legislative and congressional committees, employment of general counsel, and numerous other items, not directly or indirectly connected with the interstate transportation of gas.

"The entire *management, control and conduct* of the business was conducted from said (Birmingham) office."

This sentence places beyond doubt the situs of the corporation. The all-pervading thought is "control," and where the control is, there is the corporation. The seat of ultimate authority is declared to be in Birmingham. On the tax return (r. 11) it was stated also that the *principal place of business* is Watts Building, Birmingham. That correspondence (r. 12) relating to franchise tax should be addressed to "Watts Building, Birmingham." The return is signed and sworn to by W. R. Gignilliat, Secretary, of the corporation, in Jefferson County, Alabama (r. 14).

The corporation maintains a bank account in Birmingham and has offices and office equipment. The contract with the Birmingham Gas Company was made and *approved* in Birmingham.

"Time to time orders are given by the Birmingham office" (of the Tennessee Coal, Iron and Railroad Company and its affiliates) as their needs require. This means, as we see it, that there is a "time to time" almost daily order, from the Birmingham office of the Tennessee Company in Birmingham to appellant's office in Birmingham; that said order was there accepted or rejected, and if accepted, delivery was made. We will hereafter discuss "delivery," but manifestly there can be no delivery until the corporate officers in Birmingham approve and authorize. That the corporation retains a

measure of control over the Alabama Natural Gas Corporation is apparent from the contract (r. 20-39, inc.). On page 22 the seller (appellant) reserves the right to sell gas in area where buyer is authorized to sell, to customers other than those of buyer. On page 26 the buyer is required to separate the total amount of gas sold to (a) domestic consumers, (b) other than domestic, (c) unaccounted for gas. The importance of this is shown by the differential in the price which appellant sells to the Alabama Company for domestic consumers and in that for other than domestic consumers (r. 29). This demonstrates, we submit, some sort of control by appellant of the price which consumers shall pay, and this is done through the device of charging the domestic distributor according to the class of his customer, rather than on the quantity of gas delivered. This fact is commented upon by Justice Thomas in the opinion (r. 77).

The execution of the contracts are, we submit, corporate acts.

So completely, we submit, has appellant established corporate domicile in Alabama that if the question were the taxation of intangibles for ad valorem purposes, the same would be taxable in Alabama. While the facts are not in as elaborate detail as in Wheeling Steel Corporation v. Fox, 298 U. S. 193; 56 Sup. Ct. 773, the essential facts are the same. We summarize:

In the Wheeling case the general business affairs of the corporation were at Wheeling.

Here the general business office is at Birmingham. In fact, the office and *chief* place of business is in Birmingham.

In the Wheeling case the general books and accounting records are kept.

In the case at bar all orders are received and cleared, collections made, expenses paid, and the entire conduct of business is at the Birmingham office. This is equivalent, we submit, to the statement that general books and accounting records are kept in Birmingham.

Invoices are paid in Wheeling and are paid in Birmingham in the present case.

All moneys were controlled and expenditures directed by the Wheeling office in the Wheeling case. The same is true in this case as to the Birmingham office.

Both were Delaware corporations, and in the Wheeling case the State of its creation was designated as its principal office. There is no such designation in the record before us, but to the contrary Birmingham is declared to be its principal office.

However, this court held in the Wheeling case that this designation was a technical one and actually the principal place of business was at Wheeling.

In summarizing the evidence in the Wheeling case, it was said:

"Third. The corporation established in West Virginia what has aptly been termed a 'commercial domicile.' It maintains its general business offices at Wheeling and there it keeps its books and accounting records. There its directors hold their meetings and its officers conduct the affairs of the corporation. There, as appellant's counsel well says, '*the management functioned.*' The corporation has manufacturing plants and sales offices in other states. But what is done at those plants and offices is determined and controlled from the center of authority at Wheeling. *The corporation has made that the actual seat of its corporate government.*" (Emphasis supplied.)

By the agreed statement of facts (r. 16) these facts substantially appear in this case and it is specifically declared "the *entire management, control and conduct of the business was conducted from* (Birmingham) *said office.*" May it not be aptly said that in Birmingham the "management functioned" and that "the corporation has made that the actual seat of its *corporate government*" (emphasis supplied).

While this involved a tax on property, the basis of the decision was the ascertainment of the home office of the corporation, the seat of corporate government. This fact being ascertained, the rule of mobilia sequuntur personam was applied without difficulty and the intangibles held taxable in West Virginia. As sound and logical as is this decision in all its aspects, it is nevertheless a new application

of a well established principle. It regards the substance and not the shadow, and if we properly interpret it, declares that the real corporate seat of government shall be looked to rather than the State of its mere technical creation.

If this principle be sound as to the taxation of intangibles, we submit that likewise it should be true as to a franchise tax such as this laid on the corporation for the privilege of exercising its corporate functions or the exercise of corporate functions in the State.

The Wheeling decision ended a long existing claim that the intangibles of a corporation were taxable only by the State which initially chartered the corporation.

We submit that the reasoning supports the taxation of a corporate franchise, where the same is measured by property in the State, or other method not discriminatory or not directly affecting interstate commerce.

It is difficult, we submit, to visualize a corporation whose home and *chief office*, in fact, so far as the record shows, whose only office, is in a State where the *seat of its corporate government* is maintained, where the *entire management, control* and conduct of its business is conducted, as not exercising corporate functions in such State.

If a corporation by transferring its seat of government from Delaware to Alabama, thereby

changes its legal situs, so as to subject its intangibles to taxation, does it not thereby transfer its corporate powers and functions and are not its acts performed in the State of its adoption corporate acts? The brief of appellant dismisses this as immaterial, but admits that its intangibles would be subject to ad valorem taxation (appellant's brief, 23).

Appellant does not seem to be able to consider this tax as a corporate franchise tax, but his argument almost wholly would have the court to consider this merely an ordinary business license.

True it is a corporation engaging in interstate commerce must have an office. Also it or a corporation engaging in any other business must have a corporate seat of government.

Before there can be a business there must be a corporation. Officers must be elected; finances must be arranged; bonds issued and stock sold; policies determined and control exercised. These are anterior and superior to the business which the corporation engages in. These things are innate in the corporation and is the Court willing to say that a corporation, which transfers its corporate government entirely, is not subject to any sort of regulation or any tax for the exercise of those corporate powers, because the directors of the corporation decide that the business shall be an interstate one?

As to a domestic corporation, the State clearly has such a right.

If the corporation were a holding company, even though a foreign corporation, the State would have a like right.

In the Copper Range Company case, 246 U. S. 155, it was stated:

> "This is a Michigan corporation whose articles of association contemplate that it shall have an office in Boston. It is a holding company and owns various corporate stocks and bonds and certain mineral lands in Michigan. Its activities in Massachusetts consist in holding stockholders' and directors' meetings, keeping corporate records and financial books of account, receiving monthly dividends from its holdings of stock, depositing the money in Boston banks and paying the same out, less salaries and expenses, as dividends to its stockholders three or four times a year. The exaction of a tax for the exercise of such corporate faculties is within the power of the State. Interstate commerce is not affected.

In the Champion Copper Company case, 246 U. S. 155, it was held:

> "This is another Michigan corporation which maintains an office in Boston pursuant to a provision in its articles of association. It deposits the proceeds of its mining and smelting business in Michigan in Boston banks and, after paying salaries and expenses, distributes the balance in dividends from its Boston office.

> The management of its mine is under the control of a general manager in Michigan and he in turn is under the control of the company's directors. The meetings of the latter, which occur several times in a year, are held in the Boston office. At these meetings the directors receive reports from the treasurer and general manager, vote dividends, elect officers, and authorize the execution of deeds and the like for lands in Michigan. These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that State."

In both of these cases the claim of interstate commerce was interposed, but this court held "the exaction of a tax for the *exercise of such corporate* faculties is *within the power of the State. Interstate commerce is not affected,*" and again in the Champion Copper case, "These *corporate activities* in Massachusetts are not *interstate commerce.*" (Emphasis supplied.)

Although a corporation may lease most of its property to another company, it will still be liable for the tax imposed upon it for the privilege of exercising its corporate franchise in the State where it retains its corporate franchise, seal, books, papers, documents, and some of its property and agrees to maintain its organization and to perform a number of corporate acts in carrying out the conditions of the lease, and where it is stipulated it is to take possession of the leased property upon termination

of the lease or at any earlier time if there is default in conditions of lease.

Kansas v. Independence Gas Co., 99 Kan. 671; 163 P. 148, L. R. A. 1917-D, p. 1070.

In Attorney General v. Bay State Mining Company, 99 Mass. 148 (96 Am. Dec. 717), the Supreme Court of Massachusetts upheld a franchise tax on a mining corporation chartered in another State maintaining an office or place of business for the direction of its affairs in Massachusetts.

Any doubt as to the power of a State to levy a franchise tax upon a foreign corporation thus exercising corporate functions is effectively removed, we submit, by Atlantic Lbr. Co. v. Commissioner of Corporations, 298 U. S. 553; 56 Sup. Ct. 887. We quote the facts as set out in the opinion.

> "Appellant is a corporation engaged in the wholesale lumber business, and is organized under the laws of Delaware. Its principal office is in Massachusetts, where it also maintains a sales office. Its Massachusetts office is used as headquarters for salesmen, who solicit orders in Massachusetts and other states. In that office it carries on correspondence and other business activities in connection with orders for and shipments of goods for the designated territory. Orders are accepted at the Massachusetts office, and are filled from the distributing yard of the company or the mill of a subsidiary outside the state. Remit-

tances from its customers are made to the Massachusetts office. No stocks of lumber are kept in that state; and the only intangible property in the state is office furniture and equipment and salesmen's automobiles. Appellant has bank accounts in Boston, New York City, Buffalo, Brooklyn, and Toronto, Canada; the Boston account being the most active. The corporate books and records are kept in Massachusetts, where its treasurer is located, its directors' meetings are held, and dividends are declared. Dividends, so far as declared, have been paid out of the Boston account.

"Appellant owns practically all of the stock of three subsidiaries. Two of them are engaged in cutting timber and manufacturing lumber —one in Tennessee, Arkansas, and Louisiana, and the other in South Carolina. The third subsidiary simply holds title to timber in Louisiana.

It is reasonably clear that the actual sales and shipments involved interstate commerce, but this court, speaking through Mr. Justice Sutherland, said:

"If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution. * *

> "But such is not the case. Although organized in Delaware, so far as the record shows appellant does not function there but in Massachusetts, to which state the exercise of its corporate powers was transferred and is confined."

The decision cites the Copper Range Company and Champion Copper Company cases and states that they have never been overruled or qualified, and hence control. The opinion then differentiates the case of Ozark Pipe Line v. Monier, 266 U. S. 555; 45 S. Ct. 184; 69 L. Ed. 439.

On the question of a franchise tax on the privilege of exercising corporate functions or the exercise of corporate functions, we submit this case is well nigh conclusive:

> "Although organized in Delaware, so far as the record shows appellant does not function there, but in Massachusetts, to which State the exercise of its corporate powers was transferred and is confined."

By changing "Massachusetts" to "Alabama," the above quotation sums up and decides, we submit, the present case.

Both corporations may or may not be engaged in interstate commerce, but the court does not make this factor important, where corporate functions are exercised.

It is no answer, we submit, to assert that all these activities are merely incidental to the interstate transportation of gas. They are superior to and independent of the business. If the business activities of the Atlantic Company did not affect its liability for the tax, we submit the same should be true in the present case.

The Atlantic Company was not merely a holding company, but was, like appellant, an operating company. It had, as the appellant had in Alabama, established its place of control, its seat of corporate government in Massachusetts.

We submit that a corporation choosing to make its home, the seat of its corporate government, in a State other than that of its creation, where all of its functions are performed cannot refuse to pay a corporate franchise tax because it may happen to engage in interstate commerce.

As in the Atlantic Lumber case, the appellant here relied almost solely upon Ozark Pipe Line Company v. Monier, supra. Mr. Justice Sutherland wrote the opinion in both cases. He points out in the Atlantic Lumber Company opinion, the differences between the cases. Summarizing the Ozark case, he states:

> "a Maryland corporation owned and operated a pipe line extending from Oklahoma through Missouri to Illinois, by which crude petroleum was carried from Oklahoma to Illinois. *No oil was received or delivered in Missouri.* The li-

> cense issued by the State was to engage '*exclusively in the business of transporting crude petroleum by pipe line.*'" (Emphasis supplied).

In the present case the charter powers which have been set out at length do not limit the corporation to interstate commerce, nor are its powers and functions limited to the performance of business of an interstate commerce nature. As pointed out above, the corporation acquired the right to manufacture and to do other things which by their very nature are local.

The appellant here, like the Atlantic Lumber Company, does not function in Delaware, but has transferred its corporate powers to Alabama. There is nothing in the opinion in the Ozark Pipe Line case indicating that there had been a complete transfer of the seat of corporate government from Maryland to Missouri. The controlling factors in the Ozark case as pointed out by Mr. Justice Sutherland in the Atlantic Lumber Company case, and by Mr. Justice Cardozo in his dissenting opinion in the case of Anglo Chilean Nitrate Sales Corporation v. Alabama, 288 U. S. 218, apparently were that so far as Missouri was concerned, the pipe line was purely interstate, merely passing through Missouri from Oklahoma to a destination in Illinois and that "oil was neither received nor delivered in that State." It was further emphasized that the corporation obtained a license to "engage *exclusively* in the business of transporting crude petroleum by pipe line."

In the present case such a condition does not exist. Gas is both received and delivered in this State. It is delivered to distributors and to consumers. It is the contention of the State that as "time to time orders" are given by the Tennessee Company and its affiliates from the Birmingham office of the Tennessee Company to the Birmingham office of appellant, which orders are accepted by appellant's Birmingham office and deliveries made, an actual sale is made in Alabama. It is clear that appellant transports its own gas in its own equipment to Alabama; that the title to the gas remains in the appellant until after the order is received from the Tennessee Company and the delivery made. This is emphasized by the stipulation (r. 18) "Subsidiaries of the United States Steel Corporation, viz: Tennessee Coal, Iron and Railroad Company and Universal Atlas Cement Company *which purchased gas at their respective meter station* and distributed same by their own lines to their several points of operation." (Emphasis supplied.)

It is further emphasized by this stipulation (r. 17) "That in the sales to the Tennessee Company and its affiliates that the *pressure is reduced at the point of delivery* for the accomodation of the purchaser to meet *their needs and requirements*" (emphasis supplied). As pointed out, these "needs and requirements" are determined by "time to time orders."

It is further shown (r. 40) that appellant shall provide suitable service lines across the Tennessee

property to its Bessemer plant, its Fairfiled plant, and its Ensley plant; points which are widely separated and which require, we submit, a break in the volume before delivery.

The Missouri statute at issue in the Ozark case appears in the note in St. Louis, San Francisco Ry. Co. v. Middlekamp, 256 U. S. 226. It levies a tax on "every corporation not organized under the laws of this State and engaged in business in this State equal to 3/40 of one per cent. of the par value of its capital stock and surplus *employed in business in this State*, and for the purposes of this Act such corporation shall be deemed to have employed in this State that proportion of its entire capital stock and surplus that its property and assets in this State bears to all its property and assets wherever located; provided that this Act shall not apply to corporations not organized for profit, nor to express companies, which now pay an annual tax on their gross receipts in this State; and insurance companies which pay an annual tax on their gross premium receipts in this State."

It is to be noted that this statute is substantially different from that under consideration. The Missouri statute is clearly an excise or license tax and is on the business of the corporation. This is emphasized by the manner in which the tax is measured, to-wit, on the capital stock and surplus *employed in business* in the State. This is quite different from a franchise tax levied on the privilege of exercising corporate functions, or on the exercise of corporate

functions measured by capital employed in the State rather than capital employed in business in the State. Moreover, under the Alabama statute there is no allocation, but the tax is measured as directly by the capital employed in the State as would be a direct property tax upon the property in the State.

That the Missouri tax is an excise or license tax is further shown by the exception from its application of express companies and insurance companies, which pay certain other license taxes.

That the Alabama tax is not an excise or license on the business is settled by the language of Section 232 of the Constitution, by the repeated decisions of the Supreme Court of Alabama, including the opinion in this case (r. 79) and by the further fact that the State has levied numerous license and excise taxes on various forms of business, whether engaged in by corporations or individuals. Even the Ozark case, with the statute and the facts so greatly different, was the subject of a strong dissent by Mr. Justice Brandeis. His argument (266 U. S. 567) fully supports our contention and considered along with the decision in the Atlantic Lumber Company case, removes, we respectfully submit, the Ozark case as authority on the facts shown in the record and the construction given to the statute by the Supreme Court of Alabama.

The principle was discussed in Southern Cotton Oil Co. v. Wemple, 44 Fed. 24, at page 27, where in referring to a New York statute, it was said:

"* * But a foreign corporation, which establishes a business domicile here, and brings its property within this jurisdiction, and mingles it with the general mass of commercial capital, is taxable here; and the power of the State is ample to tax its property directly or to lay a tax upon its privilege of doing business, whether the property consists of funds deposited in bank or of goods sent here from other States, not in transit merely, but to remain here till used or sold. The principle of the present statute is that such corporation shall contribute according to the value of their capital 'employed within the State.' It lays the tax upon the privilege, and measures the amount by the amount of property which is protected here. Reasonably interpreted, the statute means by 'doing business within this State' using this State as a business domicile for transacting any substantial part, even though a comparatively small part, of the business which the company is organized to carry on, and in which its capital is embarked. It would seem that a manufacturing company which maintains an established location here, and an agent, for the purpose of selling its products or facilitating their sale, carries on a part of its ordinary business here, and has a business domicile here; and if it keeps funds here for maintaining its place of business and to enable it to carry on the operations of its agent, such a foreign company would seem to be taxable under the statute. Certainly it cannot matter that the volume of business done

is small, or that the location, instead of being a warehouse or a shop, is an office or a sample-room."

The effect of all the rights, powers and actions of appellant in Alabama can, we respectfully submit, but lead one to the conclusion that it is exercising its corporate powers in Alabama as fully and completely as it could in Delaware, the State of its original incorporation. Certainly Delaware, if the corporation were conducting itself as it does in Alabama, could under a like statute levy such a franchise tax. But the corporation has, so far as the record shows, abandoned the State of its nativity, and established its home and seat of corporate government in Alabama. Alabama clearly, if the corporation were domestic, could levy such a tax.

Can a corporation, by the fortuity of foreign corporation, come into a State, make such State its home, enjoy all its services, exercise whatever powers it desires, and yet escape the payment therefor demanded of other corporations whose operations, while few, technically are conducted in a different manner?

Appellant in its brief argues most insistently that the tax is an excise tax on the business and not a corporate franchise tax. We cannot see the basis of the argument, unless he seeks to have this court assume the function of the Supreme Court of Alabama and re-define the tax. This court has long held that so far as the definition and construction of a statute of a State is concerned, it is bound by that

given by the highest court of the State. Accepting such construction, this court, in a proper case, determines whether a statute as construed by the highest court of the State, conflicts with the Federal Constitution. This is so elementary we hesitate to even cite authority, as unduly burdening the brief, but as appellant so insistently seeks to have this court define the statute, we wish to cite briefly the following cases.

In Michigan v. Michigan Trust Co., 286 U. S. 334; 52 S. Ct. 512, in considering the same statute discussed in the Detroit International Bridge Co. v. Corporation Tax Appeal Board, supra, this court declared:

> "We are not required to choose from these diversities the construction that would appeal to us as the most consonant with reason if choice were wholly free. Choice, as it happens, is not free, for our task is to ascertain the meaning of a Michigan statute, and as to that *the courts of the state*, if they have spoken, *pronounce the final word*. The decision of the Supreme Court of Michigan in Re Detroit Properties Corporation, 254 Mich. 523, 236 N. W. 850, 852, is a controlling adjudication as to the meaning and application of the privilege fee exacted of Michigan corporations. The court held that the tax was imposed upon the privilege to 'do;' that this privilege existed though nothing was ever done; * * "

Construction of a State statute is primarily for local courts.

279 U. S 159; 49 S. Ct. 282; 73 Fed. 652.

Federal courts follow decisions of highest court of State in construing State statutes.

Concordia Ins. Co. v. School District, 282 U.S. 545; 51 S. Ct. 275; 75 L. Ed. 528.

State Supreme Court's construction of State statutes must be accepted by Supreme Court.

Chicago M., St. P. & P. R. Co. v. Risty, 276 U. S. 567; 48 S. Ct. 396; 72 L. Ed. 703.

The opinion of the Supreme Court definitely declares the meaning of the statute, and this in a case where the question of its meaning was brought directly before the court. The appellant cites and reviews a large number of statutes and argues therefrom that the nature of the tax is not settled. We respectfully submit that the proper forum for all such questions was the Supreme Court of Alabama.

While Sections 58, 59, and 42 of the Revenue Act of 1927 (Acts, 1927, pp. 176, 172) were cited, as were Sections 7209, 7211, 7212, 7213, 7216, and 7220 of the Code of 1923, by appellant in the Supreme Court of Alabama, albeit with the most limited argument, we take it that as the Supreme Court of Alabama declared this to be the tax required by Section 232 of the Constitution and defined the na-

ture of the tax, such argument and citation of statutes are largely irrelevant.

There can be no doubt, we submit, that the tax levied is upon the privilege of exercising corporate functions and their exercise. We likewise submit that this corporation both obtained the right to exercise and exercised such corporate functions.

VII.

THE TAX IN THIS CASE IS NOT LEVIED ON INTERSTATE COMMERCE OR ON THE RECEIPTS THEREFROM, BUT IS ON THE RIGHT OR PRIVILEGE OF EXERCISING CORPORATE FUNCTIONS OR THE EXERCISE OF CORPORATE FUNCTIONS IN ALABAMA.

VIII.

THE TAX IS A CORPORATE FRANCHISE TAX AND NOT A LICENSE TAX UPON THE BUSINESS CONDUCTED BY THE CORPORATION.

IX.

THE TAX IS NOT ON THE PROPERTY, BUT THE PROPERTY IN ALABAMA IS THE MEASUREMENT OF THE TAX. A TAX OTHERWISE VALID MAY BE MEASURED BY PROPERTY USED IN INTERSTATE COMMERCE.

X.

SO FAR AS CORPORATE RIGHTS AND POWERS ARE CONCERNED, APPELLANT HAD THE RIGHT AND ENJOYMENT IN ALABAMA OF ALL RIGHTS AND POWERS WHICH A DOMESTIC CORPORATION MAY ENJOY, AND USED SUCH CORPORATE POWERS IN THE SAME MANNER AS A DOMESTIC CORPORATION ENGAGED IN THE SAME BUSINESS WOULD HAVE BEEN AUTHORIZED TO DO.

While the franchise tax on foreign corporations in Alabama is a franchise tax, in its operation and effect it is not unlike an ad valorem tax, because it is measured by the property or capital employed in Alabama. While property taxation has certain limitations as to uniformity and rate, Section 232 of the Constitution, as was stated in Louisville & R. v. State, supra, is as component a part of the Constitution as are Sections 211, 214 and 217 (the sections relating to property taxes) and any tax laid under the authority of Section 232 is valid so far as the property tax provisions of the Constitution are concerned.

The State having sovereignty over the property, can levy such a tax on or measured by the property as it may see fit. In the matter of franchise taxes it may measure the tax by tax immune property.

Society of Savings v. Coite, 6 Wll. 594.

Home Insurance Company v. New York, supra.

New York v. Roberts, 171 U. S. 658.

Educational Films v. Ward, supra.

Pacific Company v. Johnson, 285 U.S. 480; 52 S. Ct. 424.

Flint v. Stone Tracey Company, supra

As to property within a State, even though used in interstate commerce, the right can hardly be questioned. Admitting the power to tax, the measurement is within the legislative discretion so long as the tax is non-discriminatory, or where "the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden interstate commerce."

K. C. M. & B. Ry. v. Stiles, supra.

We submit the power to measure a tax otherwise valid by property within the State, even though such property may happen to be used in interstate commerce, is settled by the foregoing cases and even more effectively in the cases of Postal Telegraph Company v. Adams, supra, St. Louis S.W.R. Co. v. Arkansas, supra, Ashly v. Ryan, supra, St. L. & S. F. Ry. v. Middlekamp, 256 U. S. 226.

While the statutes construed in these cases were slightly different, being in general that proportion of the capital stock, as the property in the State

bears to all the property, yet the basis of them all was the property in the State. If statutes involving complicating factors and proportions can be upheld both against the charge of burdening interstate commerce and violation of the 14th Amendment, surely a non-discriminatory tax, measured by the capital employed in the State cannot be objectionable.

The authorities are collated and cited in International Shoe Company v. Shartel, 29 Federal (2d) 604, and the Missouri statute upheld. It contained these quotations as statements of the law as laid down by this court:

> " 'The state may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made "dependent in fact on the value of its property situated within the state." '
>
> "In the case of Hump Hairkin Co. v. Emmerson, 258 U. S. 290, 42 S. Ct. 305, 66 L. Ed. 622, the Supreme Court had practically the same question as here presented. A West Virginia corporation had its place of business in the state of Illinois. It transacted practically all of its business there. It was engaged, however, in interstate commerce. The statute of Illinois, which was challenged, was very similar to the statute questioned in this case. A tax was computed upon the capital stock of the foreign corporation, 'represented by property located and business transacted' in the state of

Illinois. Mr. Justice Clarke, who wrote the opinion for the court, said that:

" 'While a state may not use its taxing power to regulate or burden interstate commerce, * * * on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements of the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule. * * * The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it.' "

We take it that the basis of measurement of this tax was sustained in Louisville & Nashville R. R. Co. v. State, supra, in which the statute was upheld by the Supreme Court of Alabama and which de-

cision this court refused to review. Mr. Justice Cardozo in his dissenting opinion in Anglo Chilean Nitrate Sales Corporation v. Alabama, supra, discusses at length this basis of measurement and upholds it as valid. There is nothing in the majority opinion to the contrary. The conflict in the two opinions was based on different conceptions of the nature of the tax.

There is nothing in the nature of the tax which directly affects interstate commerce. The tax is measured by the capital employed in Alabama.

While a State may not tax or regulate interstate commerce, we submit that a tax measured by capital employed in the State is not invalid "where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character," even though a large part of the capital be employed in interstate commerce.

It is submitted that there is nothing in the amount or character of the tax which makes it a burden on or regulation of interstate commerce beyond the authority of the State to impose.

The tax is levied upon the corporate franchise—a legitimate exercise of the State's prerogative. The measurement of the tax is based on the amount of capital employed by the corporation within the State of Alabama. It is not a sales tax or a tax on gross receipts where every transaction might be affected. It is not even an ordinary occupational tax for the privilege of selling its products. There is no at-

tempt to regulate, license or tax the business of the corporation. Only the right to exercise or the exercise of the corporate franchise is taxed.

Appellant's tax will not be affected one cent by the volume of business done. Its sales, whether within or without Alabama could be a million or ten million or one hundred million dollars annually, but if its capital employed in Alabama remains stationary, which it substantially will do, then the tax will be the same.

We respectfully submit that the following language in the Roberts case, supra, is applicable and decisive in the case at bar:

> "Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

The Roberts case was cited approvingly in Armour & Co. v. Virginia, 246 U. S., page 1, at page 7, where it was said:

> "In other words, to resume, the error of the arguments results from confounding the direct

burden necessarily arising from a statute which is unconstitutional because it exercises a power concerning interstate commerce not possessed or because of the unlawful discriminations which its provisions express or by operation necessarily bring about and indirect and wholly negligible influence on interstate commerce, even if in some aspects detrimental, arising from a statute which there was power to enact and in which there was an absence of all discrimination, whether express or implied as the result of the necessary operations and effect of its provisions. The distinction between the two has been enforced from the beginning as vital to the perpetuation of our constitutional system. Indeed, as correctly pointed out by the court below, that principle as applied in adjudged cases is here directly applicable and authoritatively controlling. New York v. Roberts, 171 U. S. 658; Reymann Brewing Co. v. Brister, 179 U. S. 445."

XI.

THE CORPORATION WAS NOT ENGAGED EXCLUSIVELY IN INTERSTATE COMMERCE.

In the foregoing pages we have with confidence presented to the court our position that the tax as defined by the Supreme Court of Alabama is levied on the privilege of exercising corporate functions or the exercise of corporate functions within this

State, and that where a corporation has the privilege, or has the privilege and has exercised it, then under the case of Detroit International Bridge v. Corporation Tax Appeal, supra, and Atlantic Lumber Co. v. Commissioner of Corporations, and the supporting cases, it is liable for the tax and that under the facts in the record appellant is liable for the tax assessed, irrespective of the business it may engage in.

However, it is respectfully submitted that the record does not show that appellant was engaged exclusively in interstate commerce, and it is no answer to all the facts in the record to assert that all the corporate acts and transactions, all the details of operation, all the contracts, all the sales to consumers, were merely incidental to and accessorial to the interstate transportation of gas.

Appellant's statement of the case contains this paragraph from page 19 of the record:

> "During the year 1931, appellant transacted and proposed to transact no business within the State of Alabama other than the business of selling, transmitting and delivering gas as aforesaid and in the manner hereinbefore set our or *business incidental* to or *directly accessorial* to such sale, transmission and delivery, and had no property *in the State except as herein stated*, used in said business." (Emphasis supplied.)

This stipulation is to be read along with all the record. The entire record constitutes the case, as

we understand it, and the Supreme Court of Alabama looked to the record as a whole. Moreover, as we read the paragraph, it means nothing more than that appellant transacted no *business* other than *selling*, transmitting and *delivering* gas as set out in the record. Certainly "selling" and "delivering" carry no implication of interstate commerce.

We quoted this proviso under our statement of facts, and likewise the two paragraphs quoted by appellant from page 18 and from other parts of the record, modying, explaining or elaborating, these stipulations. Each and every part of the record is before the court and any paragraph must be read along with the others and with the exhibits, which are a part of the record.

In Utah Power Co. v. Pfost, Mr. Chief Justice Hughes held that the generation of electric power was a manufacturing process and that the State of Idaho could tax the manufacture, even though generation and transmission were practically instantaneous and continuous. The asserted invalidity of the tax was that it constituted a burden on interstate commerce.

The case before us represents the reverse of the Utah case. We are concerned here—not with when the transmission began, but when it ended. If the subject were tangible property, the question would follow a fairly well blazed trail. Interstate commerce ends when goods come to rest within a State. Sonneborn v. Curetón, 262 U. S. 506.

Dealing as we are with a fugitive mineral, which vanishes if not contained, and whose transportation must be in powerful conduits, under high pressure (appellant's brief says it is general knowledge that it moves under a line pressure of 400 pounds) and whose principal method of storage is by pressure and increase of density, the problem of deciding when transportation ceases is very difficult. Yet, as in the Utah case, there was an instant between manufacture and the beginning of transportation, so we submit in the matter of natural gas there must be some stage where transportation ends and storage begins.

This court in East Ohio Gas Co. v. Tax Commission, 283, U. S. 471, held that when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was, while in the high pressure interstate transmission lines, and it is divided into many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumer's premises. So segregated, the gas in such service lines and pipes *remains* in *readiness* or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated and prepared for sale and sold at retail; citing State v. Flannelly, 96 Kan. 372, 383, 384; 153 Pac. 22; W. Va. & M. D.

Gas Co. v. Pub. Serv. Com. 134 Md. 137, 143, 145; 106 Atl. 265 cf. Atlantic Coast Line v. Stardard Oil Co., 275 U. S. 257; Brown v. Maryland, 12 Wheat. 419; Leisy v. Hardin, 135 U. S. 100.

In the case at bar the Tennessee Company and its affiliates are consumers of gas, and residents of Alabama. The appellant brings in the gas in mass form, a part of which will ultimately be sold to the Tennessee Company and a part to the local distributing companies, and perhaps a part used by appellant for its own purposes, but of which there is no separation or identification. The title of the gas remains in the appellant until actual delivery. The high compression container is in a way a method of storage, because of the peculiar qualities of the product.

When the gas reaches Alabama and comes to rest, if gas can ever be said to come to rest, the consumer Tennessee Company and its consumer affiliates give an order for its needs. These are termed "time to time orders." If the order is accepted, the appellant delivers the gas.

What of the method of delivery? By reference to page 40 of the record we read:

> "Seller shall at its own expense provide in advance of the initial delivery date of March 1, 1930, *service lines of suitable size to a point mutually agreed upon on the property of Buyer's Bessemer plant. To reach Buyer's Fairfield Plant Seller shall provide a service line that will cross Buyer's Ensley property* and

run in a southwesterly direction on the property of Buyer to some point mutually agreed upon, on *Buyer's Fairfield* premises. Buyer agrees that it will make no charge for right of way for any part of the service lines traversing its property. A suitable meter will be provided for metering gas that may be used in the *Bessemer plant,* in the *Ensley plant* and in the *Fairfield plant,* of the Buyer and the plants of other subsidiary companies."

As the Supreme Court of Alabama says, we know Bessemer, Ensley and Fairfield are widely separated places. On page 18 the Universal-Atlas Cement Company is named, which is a separate consumer corporation, whose chief plant is at Leeds, Alabama, also widely separated from the other places.

On page 17 of the record we read:

"That in the sales to the Tennessee Company and its affiliates the pressure is reduced at the point of delivery for the accomodation of the purchaser to meet *their needs and requirements.*"

This means, we submit, that pressure is not uniform from day to day, but that the gas is operated on—the pressure is changed dependent on—the "needs and requirements" of the purchasers as advised in their "time to time orders."

On record page 18 it is stated that the subsidiaries of the United States Steel Corporation are the

Tennessee Company and the Universal Atlas Cement Company *"which purchased gas* at their respective meter stations."

We respectfully submit the East Ohio Gas Company case should be decisive. The gas was brought into the State by the appellant in its own large mains. On reaching Birmingham it is broken into three or more supply mains by the appellant, which mains belong to the seller, in which the pressure is reduced, and which run across the purchaser's property. Upon receiving an order from the Tennessee Company, the pressure is reduced to meet the needs and requirements for any particular day or period.

These supply mains by which the gas, when the original volume is broken are termed in the contract "service lines," which are the exact words used in the East Ohio Gas case.

> "So segregated the gas in *such service lines* and pipes remain in readiness or moves forward to *serve as needed.*" (Emphasis supplied.)

Quoting from the case of Public Utilities v. London, 249 U. S. 239, the court continued:

> "Interstate movement (of natural gas being transported from State to State) ended when the gas passed into the local mains."

It was further stated:

> "The business of supplying on *demand* local *consumers* is a **local business*, even though the

gas be brought from another State and drawn for distribution *directly from interstate mains;* and this is so whether the *local distribution* be made by *the transporting company* or by independent distributing companies. In such case the *local interest is paramount*, and the interference with interstate commerce, if any, *indirect* and of minor importance." (Emphasis supplied.)

The foregoing quotation from Missouri Gas Co. v. Kansas Gas Co., 265 U. S. 298, was as we read it, quoted approvingly as the rule of the law.

The court likewise disapproved Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, to the extent it conflicted with the foregoing.

Appellant assumes that this case makes the conversion from interstate to local business to take place only when the supply mains are further divided into the numerous small outlets of the consumer. It would appear that "the treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail," and the "business of supplying on demand local consumers is a local business, even though the gas be brought from another State and drawn directly from the interstate mains" would seem under the facts to be a complete answer to this assumption or argument.

True it is that the gas is sold to a large consumer, but these sales are made in Birmingham on "time to time" orders. Deliveries are made by tapping the large interstate mains and running small or smaller *service* lines to different places on consumer's property to the point of delivery where the *pressure* is further reduced to meet the "needs and requirements" of the purchaser.

We submit the only difference between the sales to the Tennessee Company and its affiliates and the facts in the Ohio Gas Company case is one not of kind but of degree. Instead of the breaking being into a large number of small conduits, the breaking is into a few small conduits.

In both the bulk is broken.

In both the gas is treated; that is, the pressure is reduced. In the sales to the Tennessee Company, the pressure is reduced according to the "needs and requirements of the purchaser.

The order is given in Alabama.

The acceptance is made in Alabama.

The delivery is made in Alabama.

The pressure is reduced at the time of tapping the interstate mains, with the several service mains and finally at the point of delivery where the pressure is reduced for the accomodation of the consumer customer's needs.

The appellant is engaged in the "business of supplying on demand" a local consumer, and we submit the business is local "even though the gas be drawn for distribution" to the several points, widely separated, o fthe purchaser, "directly from the interstate mains." Moreover it is stipulated that the Tennessee Company and its affiliates *purchase* gas at their respective meter stations. Selling gas to consumers in Alabama, like the selling of any other commodity in the State of Alabama, constitutes, we submit, doing actual business in Alabama.

If the commodity were a more tangible product, the fact that prior to sale the seller brought the product into the State by interstate commerce and then sold it, that such sale was a local transaction would not be open to question.

Is the situation any different when a corporation, which has made its legal residence in Alabama, has established its chief office and place of business, brings gas into the State, breaks the interstate bulk into three or more divisions, reduces the pressure and sells the gas at the several metering stations directly to consumers.

We submit the case is no different from that in the Ohio Gas Company case *in kind*, but only *in degree*.

The case in many aspects is similar to A. C. L. R. R. v. Standard Oil Co., 275 U. S. 257. The commodity is different, and the method of handling different, but the principle is analogous.

That the fact that there a contract for a long time does not militate against our position is we submit, settled by these statements in A . C. L. R. R. v. Standard Oil Co., supra:

> "The fuel oil is furnished by the Standard Oil Company of New Jersey to the plaintiff under a yearly contract for a million barrels to be delivered monthly in tank steamers at Port Tampa and Jacksonville as needed. Approximately ninety-five per cent of the fuel oil sold by plaintiff in Florida is on contracts made before the oil has been shipped from the point of origin to plaintiff at Port Tampa and Jacksonville. Most of these are for a period of a year, covering the requirements of the various consumers with average monthly deliveries stipulated, although, in actual practice, shipments from the storage tanks to the consumers are accomodated to their needs as under requirement contracts. There is no separation of the fuel oil under contract, all being of the same grade. At the time the shipment of the fuel oil is made from the point of origin, plaintiff cannot say where any particular cargo of it, or any part thereof, will go after it has been pumped into the storage tanks, to whom it will go, or when it will be shipped. At the time of shipment from the point of origin, the only destinations which can be given are Port Tampa and Jacksonville, respectively.
>
> "***While the fuel oil is purchased by the plaintiff from a selling company, which has a

year's contract, the seller delivers it from Tampico, at the Florida seaboard, as it is likely to be needed to meet the obligations of a number of yearly contracts made by the plaintiff for its delivery in certain parts of Florida. No oil which comes in is labeled or identified in any particular way with any particular company, except after it is shipped to that company from Tampa or from Jacksonville. There is no passage of title from plaintiff to the contract purchasers, and there is no setting apart of particular oil, until the shipments are made at the end of this interval of weeks and months in accordance with the needs of those who have contracted to buy it."

Here the appellant cannot tell what gas or even how much will be delivered to its various customers until the "time to time orders" are given, accepted, and delivery made, after the pressure is reduced to meet the requirements of such orders.

This breaking is real and substantial. Appellant's brief states that the line pressure of interstate mains is four hundred pounds. On record page 43 it is shown that the "natural gas shall be delivered (to the Tennessee Company) at a pressure of not less than thirty pounds guage at some mutuallly satisfactory *location* or *locations* upon the premises of the buyer and the seller (appellant) shall then furnish and install proper meters for measuring the amount of gas sold".

By reference to page 46 of the record, we find that the seller has the right to extract natural gasoline and helium content. On page 47 provisions to govern the pressure and temperature at which the gas shall be delivered are carefully set out. All of this shows, we respectfully submit, that the gas, after reaching Alabama in the four hundred pound pressure main, is broken, treated, pressure reduced, transported to places of sale and sold upon "time to time" orders given by the Birmingham office of the Tennessee Company to the Birmingham office of appellant, accepted by appellant and delivery made after reducing the pressure to meet the needs and requirements of the purchaser in the manner set out heretofore.

We respectfully submit that the interstate journey ended when the gas passed from the interstate mains to the service mains and that thereafter the sale, which was clearly so far as the manner of the execution of the contract was concerned, an Alabama transaction, constituted a local sale of gas. So far as the Tennessee Company was concerned, it bought gas in Alabama from appellant. It was immaterial to the Tennessee Company how the appellant brought the gas to Alabama or what it did with it after it arrived. It merely ordered from appellant in Birmingham, gas to be delivered to its plants. When appellant broke the bulk, i.e., lowered the pressure from that existing in the high pressure interstate main and by small service lines conveyed the gas to the customer, we submit the act of sale was local. The gas is not delivered from the high

pressure line to the line of the premises of the buyer, but the bulk is broken, the pressure reduced and the gas is carried over its property for delivery to its various plants located at widely different places. We respectfully submit that in the sales to the Tennessee Company at least, appellant was engaged in a local business.

Appellant also sold gas to public utilities. These sales, like those to the Tennessee Company, were made by orders to the Birmingham office and again there was an order and acceptance and delivery in Alabama. The facts, however, do not show a breaking of the bulk in a detailed manner as that set out in the Tennessee Company contract. It is, however, shown that appellant contracts "to use due diligence at all times during the term of this agreement to maintain a reserve supply of natural gas sufficient as to the quality and quantity and delivered under pressure adequate fully to meet the needs of all the customers of the buyer hereunder". (R. 30)

Perhaps reference should be made to the fact that even though the Tennessee Company had a long term contract, yet the delivery was subject to certain factors, notably the "priority of gas required to be delivered to Southern Cities Service Company under its agreement with seller (appellant) dated March 29th, 1929", and "temporary curtailment due to extreme demand of domestic consumers". Therefore, under the contract, when the Tennessee Company gave its orders "from time to time", delivery was patently

subject to *acceptance* by appellant because other customers had priority.

We have discussed at length heretofore the question of the exercise of corporate functions in Alabama by appellant. While this argument was devoted to and conclusively, we submit, demonstrates that so far as the exercise of purely corporate powers in Alabama, under the facts and the definition of the statute given by the Supreme Court of Alabama, appellant was liable for the franchise tax assessed. We likewise submit that these factors showing that it was exercising corporate functions and doing business in corporate form also show that it was doing business in Alabama in the general acceptance of the term. The corporation had transferred, as we conceive the record to show, its seat of corporate government from Delaware to Alabama. It had established its home office and chief place of business in Alabama. In Alabama the "management functioned". It carried on all the details of its business in Alabama. It kept its bank account in Alabama. It paid its office expenses there. It paid its employees and authorized the payment of other expenses. In fact, so far as the record shows, every detail of its business was either done or authorized at the home office in Birmingham. The sales were actually made in Birmingham. Orders were received. The same were accepted or rejected and deliveries ordered to be made.

Appellant argues that these acts were merely incidental and accessorial to the interstate transporta-

tion of gas. When we consider that this is a corporation which sought the right and franchise of exercising corporate functions in Alabama, they are and constitute corporate acts, and the sum of them the exercise of corporate functions. We submit also that they constitute the doing of business in Alabama as the term is commonly considered. They constituted business acts in themselves, independent of the transportation of gas. Certainly they constitute corporate acts and functions, independent of such transportation, and the doing of business in corporate form. This position, we submit, is fully supported by the Copper Range and Champion Copper cases, supra, as amplified and made certain by the case of Atlantic Lumber Comany vs. Commissioner of Corporation, supra.

If the operation of the office in Birmingham is interstate commerce, we respectfully ask, can the Federal Government regulate the wages and hours of the employees of the company at the Birmingham office—the bookkeepers, accountants and other employees that engaged in the purely corporate business of the corporation? Are the drivers of the trucks in Alabama so engaged in interstate commerce as to be subject to Federal safety rules and regulations? Are the trucks themselves subject to the Federal Motor Carrier Act if the same be applicable? Is the sale of worn out trucks incidental to the interstate transportation of natural gas? When the directors meet in Birmingham to hear the reports of the general manager and to adopt rules of corporate government, amend charters, adopt by-

laws, execute contracts and pass resolutions, are they engaged in interstate commerce?

We respectfully submit that such is not the case, but that they are acting pursuant to corporate powers sought and acquired and that the corporation itself, having acquired the privilege of exercising corporate functions in the State, has availed itself of such privilege and has not only exercised functions purely corporate, but has engaged in business in the State of Alabama of a local nature.

APPELLANT'S BRIEF

Appellant's brief in the first several pages contains a number of statements and references to statutes to which we think a brief reply should be made. We do not see the relevancy of any of these matters in view of the decision of the Supreme Court in this case in which the meaning and interpretation to be given to Section 232 of the Constitution and Section 54 of the Revenue Act of 1927 (Acts 1927, p. 176) was sought and which was carefully defined by the court.

We are not in this proceeding concerned with the wisdom or even the constitutionality of other statutes, but the discussion must confine itself to the one question whether the franchise tax imposed under the statute, as construed by the Supreme Court, was under the facts violative of the interstate commerce clause of the Federal Constitution. Therefore, in making this brief reply to this portion of

appellant's brief, we do so not from any thought that the same is important or even relevant, but to remove certain inaccuracies and to place before the court the picture of the whole body of law as we conceive it to be.

Under the title "The Jurisdiction of this Court" (Brief 2) appellant states that it contends that the assessment not only constitutes a burden on interstate commerce, but was in violation of the equal protection and due process clauses of the 14th Amendment. While it is true that in its appeal to the Circuit Court of Montgomery County the violation of the 14th Amendment was asserted, and in the assignments of error on appeal to this court, it was claimed that the assessment was in violation of the 14th Amendment, no such argument was made in the Supreme Court of Alabama. The Supreme Court of Alabama did not pass on it, as appears from the opinion. Further, the assessment cannot be in any respect a denial of due process for the reason that the tax is measured by property wholly within Alabama and over which the State has jurisdiction. There is no effort to tax property beyond the State.

Appellant's brief contains numerous and compendious notes which we assume are to be considered as a part of its argument and we will, if any so warrant, answer such notes as if a part of the brief proper.

Under the title "Statement of the Case," (Brief 3) appellant refers to the contract with the Tennessee Company as an "interstate contract." Such a conclu-

sion not only begs the question but is, we submit, contrary to the facts shown in the record, as we have heretofore demonstrated.

We have previously commented on the three paragraphs quoted from pages 18 and 19 of the record. Of course these and all other provisions of the record are to be read together and the picture to be gathered from the whole.

Coming to appellant's discussion of the particular statute and what are termed "supplementary statutes," we wish to call attention to and emphasize the following: Appellant refers to "the initial qualification tax or admission fee required only on actual qualification to do business (Acts 1927, Sec. 42, p. 171)," (Brief 5). We are at a loss to understand this statement.

Section 232 of the Constitution, as we have pointed out, provides essentially three things as discussed. Beard v. Union American Pub. Co., supra, and Sullivan v. Sullivan Timber Co., supra. These things are:

1. No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein and *without filing with the Secretary of State a certified copy of its articles of incorporation or association;*

2. Such corporation (i.e., such qualified corporation) may be sued in any county where it does business," etc.; and

3. The Legislature shall by general law provide for the payment to the State of Alabama of a franchise tax *by such corporation* (i.e. we submit, such qualified corporation), but such franchise tax shall be based on the actual amount of capital employed in this State.

The foregoing is the constitutional mandate and if there is any conflict or uncertainty between other statutes and those enacted in pursuance to these constitutional requirements, then the latter necessarily conrol.

Pursuant and in obedience to the first clause, the Legislature adopted Section 7209 of the Code of 1923 (Sec. 3642, Code of 1907) and provided for the filing of the charter by foreign corporations desiring to qualify, in the office of the Secretary of State. The Act while slightly amplified, is almost in terms the same as the first proviso of Section 232 of the Constitution.

This is the initial requirement for a corporation to do business in Alabama. Upon such corporation desiring to exercise its corporate powers in this State, the first preliminary and constitutional requirement is that it file its charter in the office of the Secretary of State and name a statutory agent. The same section of the Constitution requires the Legislature to levy a franchise tax upon *such corporation*. This filing of its charter in the office of the Secretary of State qualifies it as a corporation. Other provisions, with the exception of the franchise tax, are of statutory origin, but the qualification

under Section 7209 of the Code and the franchise tax as levied by Section 54 of the 1927 Revenue Act and the other Acts levying annual franchise taxes (1915, 1919, 1923) to which we have referred, are in obedience to constitutional mandate.

It was held in the cases of Ewart Lumber Co. v. American Cement Plaster Co., 9 Ala. App. 152; 62 So. 560; and Muller Manufacturing Co. v. First Nat'l. Bank of Dothan, 176 Ala. 229, that Section 7209 is predicated upon Section 232 of the Constitution. The initial qualification and the initial right or privilege of exercising corporate functions in Alabama, which we have heretofore emphasized, were secured by virtue and under the authority of Section 7209 of the Code, passed pursuant to the mandate of Section 232 of the Constitution.

As was stated in the Ewart Lumber Co. case, supra, Section 7209 does not compel a corporation engaged purely in interstate commerce to qualify. The qualification, therefore, by a corporation engaged in interstate commerce is, we submit, voluntary presumably and because it desires the right to perform acts or exercise functions and powers which are not interstate. Its private motives, though, do not seem important.

Appellant, in note, refers to its application for permit under Section 42 of the Revenue Act of 1927, and the permit issued thereunder. (Brief 5). As stated, this is not the initial qualification under Section 232 of the Constitution and Section 7209, and which is set out and quoted in the record.

Appellant states further, under 3, that the franchise provision is "an annual tax levied not by way of permit only as a condition precedent to doing business, but in respect to an actual doing of business in Alabama." (Brief 6) This is a statement of conclusion contrary, as we read it, to the opinion of the Supreme Court of Alabama, which fully discusses and defines Section 232 of the Constitution and Section 54 of the 1927 Act.

Under the heading "Section 232 Constitution of 1901," appellant quotes the two provisos which we have emphasized above. Section 7209 of the Code was adopted in obedience to the first paragraph and Section 54 of the 1927 Act was passed pursuant to the last paragraph.

Appellant also refers to Section 7216 of the Code of 1923, which asserts that the qualifying tax or admission fee levied by Section 7214 is the franchise tax "exacted under Section 232 of the Constitution." (Brief 7). He states that Section 7214 was repealed by Section 312 of the Revenue Act of 1935, "but even before repeal it was asserted that Section 54 of the Act of 1927 was enacted pursuant to the mandate of Section 232 of the Constitution *thus leaving that matter in confusion.*"

We are greatly surprised that appellant should have any confusion in deciding what is the franchise tax required by Section 232. The Supreme Court in all the cases, L & N v. The State, supra, Anglo Chilean Nitrate Sales Corporation v. State, supra, Investors Syndicate v. State,

supra, and in the present case, has certainly declared that the annual franchise tax levied by the different Acts as outlined in our original statement, was the franchise tax required by the Constitution. Surely the direct statement contained in the opinion of the court in this case will be sufficient. It might be stated, however, that Sections 7214, 7215, and 7216 have never been enforced. The Attorney General in an opinion which we are attaching in the appendix, held almost immediately after the adoption of the Code that the Revenue Act of 1923 repealed these sections and that the admission fee of foreign corporations was to be paid under the General Acts of the Special Session of 1907, at page 200. It is curious that while this section has remained in the Code and been argued from time to time by various attorneys, including the distinguished counsel for appellant in the case of Penn Mutual Life v. State, 135 So. 346, the Supreme Court of Alabama has never given it sufficient consideration to even pass on it. With the Attorney General's ruling, the 1927 Act was passed and clearly this was a legislative approval of such construction. If there is anything clear in the law, it is that the annual franchise tax is levied in obedience to the mandate to Section 232 of the Constitution, and that in construing the statute, the constitutional provision likewise will have to be construed.

We will refer briefly to the various sections named in appellant's brief. (Brief 7-8-9).

Section 7208 refers to and applies to corporations required to qualify by Section 232 of the Constitu-

tion and by Section 7209 of the Code. As stated, this section does not require corporations engaged solely in interstate commerce to qualify. Sections 7211, 7212, and 7213 have reference to Section 7209 and apply to corporations which have not qualified thereunder. These are protective statutes and not in derogation of any Federal right which a corporation may have.

Sections 7218, 7219, and 7220 are statutory Acts and are not in any way required by Section 232; nor did they attempt in any manner to amend Sections 7209 and 7211, but they merely attempted to add an additional requirement.

Interstate Trust, etc. Co. v. Nat'l. Stockyards Bank, 200 Ala. 424; 76 So. 356.

In 1927 the Legislature, in addition to the franchise tax which was required by the Constitution, levied an additional tax, which it termed the "permit fee" on domestic and foreign corporations. Manifestly this annual permit is not required by Section 232 of the Constitution; is not in derogation of or in limitation of the franchise tax required to be levied by the Constitution, and whether valid or invalid, or however construed, cannot affect a corporation's liability to qualify as required by Section 232 of the Constitution and Section 7209 of the Code, and to pay a franchise tax as required by the same section of the Constitution and Section 54 of the Revenue Act of 1927. The permit statute itself shows that it is in addition to any other license or privilege taxes required to be paid by law. It is a

statutory excise tax. It has no provision, as there is in Section 232, that it shall be paid by every corporation qualified to do business, which requirement is made by the franchise tax provision of Section 232.

It is clear, we submit, that this section is primarily an excise provision for the purpose of raising additional revenue and that if a corporation is engaged purely in interstate commerce and has no enjoyment of other privileges or exercises no other corporate functions in the State, it would not be liable for such permit. While this section has never been defined, it is purely statutory, whereas Section 54 is a creature of the Constitution. Appellant refers to the penalties provided by Section 5324 of the Code. Careful reading of this section will show that it applies to ordinary license taxes.

Sections 3731 and 3732 are not imposed on corporations engaged purely in interstate commerce.

Citizens, etc. v. Buckheit, 14 Ala. App. 511.

The purpose of all this discussion of these various sections seems to be to cast discredit and confusion, if possible, on the opinion of the Supreme Court of Alabama. If the argument is made seriously, it overlooks the fundamental question in the case. Section 232 of the Constitution provides that no foreign corporation shall do any business in this State without qualifying and that the Legislature shall require a franchise tax on *such corporation*. The meaning and conditions imposed by these two

provisions of the same section of the Constitution present the case before the court. They are the fundamental and controlling provisions, and the interpretation given to them by the Supreme Court of Alabama, and particularly the interpretations given to the franchise tax provision, is all, we respectfully submit, before the court in this case. The other statutes to which appellant makes reference may be wise or unwise, valid or invalid, but we are not in this case interpreting or passing upon them. The court has defined the meaning of Section 232 of the Constitution clearly in the present case and Section 54 of the Revenue Act of 1927, and any reference to these various statutory Acts is largely irrelevant.

Appellant states that it qualified because it could take no chances. We submit that by that very statement and by the statement contained in its original return to the State Tax Commission as a part of its statement (r. 4) when it stated that it "does not now propose to transact any local business within the State, but incidental matters may arise which might possibly make it desire to engage in some local transaction;" admits that the corporation when it qualified desired the privilege of doing things other and greater than those guaranteed by the Federal Constitution. The fact that it offered to pay franchise tax on a nominal amount shows, we submit, that either it was of the opinion that it was exercising corporate functions, or that it expected to. There was no occasion, if the corporation was engaged purely in interstate commerce, for it ever to qualify in Alabama.

Nor can we agree with the statement contained in appellant's reference to the opinion of the Supreme Court of Alabama. The court very clearly stated the meaning of the franchise tax. Appellant further states that because of its uncertainty it paid the license under Sections 42 and as we understand under 7219. If appellant was engaged in interstate commerce, this was not necessary. Appellant continues by arguing that the disclaimers which it states were attached to its application for permit under Section 42, have some bearing on its liability in this case. There was no disclaimer in the qualification which it filed in the office of the Secretary of State on May 12, 1928, which if it desired the right and privilege of doing business in Alabama, it was required to do; but to the contrary, its charter authorized it to engage, as we have heretofore emphasized, in every sort of endeavor, whether local or not. Having qualified, it became the duty of the tax authorities to require franchise tax return and if it developed that it was exercising corporate functions in Alabama or had acquired under such qualification the privilege, then the payment of franchise tax followed. We do not know what appellant means by referring to Section 42 as the complete and final license issued, and that the distinction between Section 42, the permit statute, and Section 54, the statute levied by constituional requirement, were not called to the attention of the court in the Anglo Chilean case. We think, to the contrary, that the opinion of Mr. Justice Cardozo, appearing in 53 Sup. Ct. Rep., at page 377, is clearly an answer to such a statement. Appellant, how-

ever, is laboring under the wrong premise. The initial qualification required by Section 7209, plus the franchise tax required by Section 54 of the 1927 Act, are the statutes with which we are concerned, and any reason for argument as to Section 42 of the 1927 Act, or any of the other license Acts, is immaterial.

Under the title "Of the Statute Involved," appellant states that "this is in no sense a license or levied as a condition to the doing of local business. (Brief 12). It is simply an excise tax on doing business which attaches only if the object of the tax (i.e., doing business) exists." We agree that this is not a license or excise tax in the ordinary acceptation of the word, but is a franchise tax levied, as the Supreme Court said, on "the privilege of exercising corporate functions or the exercising of corporate functions in Alabama." We therefore will content ourselves in answer to this so positive averment, to referring to the opinion of the Supreme Court.

Appellant proceeds to refer to the penalties provided in the franchise tax law. (Brief 12). There is a penalty provided by Section 59 of $10 a day for each day's failure to make the return, which penalty can be waived by the State Tax Commission upon good cause, and which is recoverable only by suit in the Circuit Court. It is not in any degree a summary penalty. The one per cent. per month is for delinquency in payment of any tax. Such a penalty is usually assessed in tax matters, is not unreasonable, and in no way works a forfeiture. Appellant, it

will be noted, on this page, after referring to the $10 a day, which is subject to so many conditions, and the one per cent. a month penalty, and the payment of the eight per cent. interest, refers to Section 66 of the Act and states that there is a five per cent. penalty for unsuccessful appeal. A reference to the Act will show that in the previous sections, where the penalty was levied, it was one per cent. In the appeal section, it is stated, "If the assessment appealed from by the corporation is sustained in the Circuit Court, the five per cent. penalty *provided for herein* shall be calculated to the date of judgment," etc. The penalty provided herein is that provided by Section 61 for delinquency in payment of the tax. The five per cent. referred to in Section 66 has no effect because a five per cent. penalty is not levied in any other sections of the statute. Historically it might be stated that the 1923 Act provided a five per cent. penalty. The Legislature in rewriting the 1927 Act, changed this to one per cent., but by inadvertence, presumably, the amount was not corrected in Section 66. The answer to this is that no penalty has been assessed against appellant.

We apologize to the court for so extended a discussion. Appellant, however, seems to emphasize that the different penalties which are customary in tax laws as something which bludgeoned appellant into qualifying. The State, in protection of its own citizens and enforcement of its laws, attaches penalties on those liable for not obeying them, but if appellant was engaged in interstate commerce in

1928, when it qualified, and did not intend or expect or desire to engage in any other functions or enjoy or employ any other powers, or have the right so to do, there was no penalty whatever, and the qualification was voluntary. "Its motives cannot affect the legal questions involved."

International Harvester Co. v. Kentucky, 234 U. S. 584.

Appellant proceeds by stating that "it is to be noted that no opportunity for protest to the Tax Commission is definitely provided. This is also true in case of the drastic penalties surrounding the license requirements." As we have pointed out, the penalties so far as they relate to franchise tax, can be waived and the $10 a day penalty cannot be collected except by suit. The right of the taxpayer to make a full return and to appeal is a sufficient guarantee of due process of law. Mr. Cooley in the Fourth Edition, Volume 3, Section 1121, states that the rule is laid down, citing cases from this court, that "if at some stage of the proceeding the taxpayer has a right of hearing, due process is complied with." Of course, as a matter of practical operation, the return of the taxpayer is an appearance, and he can appear personally and make any showing which he may desire, and following the hearing and assessment, he has a right of appeal, both to the Circuit Court in Montgomery County, and to the Supreme Court of Alabama.

Appellant under this same heading emphasizes the application for permit. (Brief 13). We believe we

have shown fully that the permit is not constitutionally required and appellant's ex parte statements or otherwise will not relieve it from liability for franchise tax if under the facts and construction given, it is liable therefor. As stated above, in its return for franchise tax in 1931, appellant stated that it might engage in some matters of local business, and tendered nominal payment of franchise tax. Naturally, this was rejected. If appellant under all the facts is liable for franchise tax, the statute makes the capital employed in Alabama the measure of the tax. We know of no authority for a taxpayer, other than in the Federal Capital Stock Tax, to fix the amount which he desires to pay.

Under the heading "The Assessment by the State Tax Commission," appellant says "the Tax Commission granted no permit. It had no Statutory authority to grant a permit." (Brief 15). Admittedly at that time the permit was issued by the Secretary of State. It was an administrative act and the liability and the privilege were fixed by the Legislature. The issuing office was purely administrative. The State, not the officer, grants the privilege.

Appellant states the (franchise) form did not require it to report that it had procured a license for 1931. The form did show that appellant had qualified to do business in 1928. Naturally, then, its qualification was a pertinent fact with reference to franchise tax.

We agree with the last statement in this paragraph, that the Commission was not authorized to levy a tax based only on property employed in a lo-

cal business. If the corporation was subject to franchise tax, its entire capital employed in the State is a measure of the tax.

Under the heading "The Appeal from the Assessment," (Brief 17-18) appellant shows its divisions of the property to the east of Birmingham, and to the west. It seems to indicate that the court can arbitrarily assign a portion of its capital employed in Alabama and require payment of franchise tax thereon, and omit another portion. This is not a tax on gross receipts or other method by which interstate commerce is directly affected or burdened. It is a tax the measure of which is the capital employed in Alabama, and if appellant be liable for franchise tax, then the measure is its entire capital employed in Alabama, the words of the statute being, "Actual amount of the capital employed." The question which faces the court is one of power. If the State had the power, as we respectfully submit under the record it had, to levy a franchise tax, then the measure of the tax as given by the Legislature must follow.

In concluding this portion of its brief, appellant states that the Supreme Court of Alabama, reversing the Circuit Court, sustained the tax in its entirety on the ground that appellant was engaged "in intrastate commerce within the State." Appellant has totally misconstrued or misapprehended the opinion of the Supreme Court, and which is before the court. The Supreme Court held that "the franchise tax here exacted and being considered is not

on any basis a *tax on business* or a *burden on the corporation's interstate commerce*, but is laid on the *exercise of corporate functions* or on the *privilege of exercising* corporate functions within the State." The court concluded, as we read the opinion, and from which it is difficult to see how any other deduction can be drawn, that taking the foregoing definition of the tax, it found that the corporation had qualified and acquired the privilege of exercising corporate functions. Too, that it had actually exercised those functions in the State. Therefore, under the definition given, the corporation was liable for franchise tax. The court, however, was of the opinion that in addition to the above factors making it liable for franchise tax, the corporation had actually transacted local business in Alabama. It did not, though, sustain the tax solely on the ground that appellant was engaged in intrastate commerce.

Appellant's principal point, of course, is that it was engaged in interstate commerce and its almost sole supporting authority is the case of Ozark Pipe Line Corporation v. Monier et al., 266 U. S. 555.

The appellant's brief contains so many conclusions and misconceptions of the tax in question and its nature, that it is difficult, without taking it up line by line, which would unduly extend this brief, to fully answer each and every conclusion, assumption and suggestion contained therein. We will content ourselves, therefore, to a few general statements.

1. First and foremost, counsel term and argue that the franchise tax is nothing more than an excise or license tax on the corporation, such as could be imposed on either corporations or individuals.

This is refuted by the Constitution itself, by every provision of statute and by all the decisions of the Supreme Court of Alabama. That it is a corporate franchise tax, there can be no doubt.

Numerous other excise and occupation taxes are laid upon individuals and corporations, but this tax is purely corporate.

2. The genesis of the tax is the constitutional mandate (Constitution, Sec. 232). It must be construed along with the statute enacted pursuant to its mandate, and which is in almost its exact words. The Constitution (and the statute) provides: "The Legislature shall by general law provide for the payment to the State of Alabama of a franchise tax by *such* corporation, but such franchise tax shall be based on the actual amount of capital employed in Alabama."

The error of appellant's argument lies in his attempt to superimpose on Section 232 and the statutes (7209 of the Code and 54 of the 1927 Act) other statutes not adopted pursuant to the Constitution and which can in no way, we respectfully submit, affect its definition, when the meaning has been pronounced by the Supreme Court of Alabama.

From the terms of the Constitution, the constructions follows, we submit, most logically.

Section 232 declares that before any corporation not organized under the laws of Alabama shall do business in Alabama, it shall qualify.

This the corporation did.

Then the Constitution declares that the Legislature shall require the payment of a franchise tax by "such corporation." Necessarily this means by the corporation which has qualified under the preceding section.

The only question remaining, we submit, is what constitutes "shall do business" or "doing business" as used in the statute. This is defined by the Supreme Court to mean the privilege of exercising corporate functions in the State.

The opinion further shows the construction placed on the corresponding section (229) of the Constitution applying to domestic corporations and states that so far as possible domestic corporations and foreign corporations qualifying are treated the same, and enjoy the same powers.

This makes the Detroit International Bridge case, supra, most apt, if not absolutely controlling. Interstate commerce was the principal and, so far as the record shows, all the business of the corporation. The statute applied with equal force to both domestic and foreign corporations. The corporation had the right of greater powers than that of interstate commerce, and notwithstanding the fact that it was claimed its sole business was interstate commerce, the Tax was upheld.

The Michigan statute as written and construed is substantially like the Alabama statute as construed by the Supreme Court in this case. If the fact that appellant is of foreign corporation, invalidates the tax, then it would seem that the Michigan statue levied in the same terms on both domestic and foreign corporaions would, as applied against a domestic corporation engaged in interstate commerce, be a denial of equal protection.

We submit, however, that this court upheld in the Detroit case the right of a State to levy a tax on "the privilege of exercising corporate functions in the State," that this decision was not by its terms or import limited to domestic corporation, and therefore the tax levied in the present case is valid.

On page 26 of the brief appellant states that the Alabama Public Commission has never taken jurisdiction over appellant. There is nothing in the record either way, but it is difficult to see the importance of the argument.

Interspersed throughout the brief is appellant's assertion that the stipulation in the second paragraph of page 19 of record is the "controlling stipulation." We submit that this is to be read along with all the record.

Appellant, however, ignoring the record, has attached copies of permits received by it under Section 42 of the Revenue Act. Either this is immaterial, or it directly contradicts what we consider a controlling paragraph of the stipulation (r. 16):

"(3) From the *date of the qualification* of the Southern Natural Gas Corporation through and including the date of the assessment appealed from, the Corporation had been *qualified to do business as a corporation* in the State of Alabama and has had the *right to use and enjoy all the powers as authorized* by its charter; that it paid a permit fee annually and annually secured the right to so whatsoever it was *legally authorized* to do in the State of Alabama." (Emphasis supplied.)

The procedure here attempted is unusual. It is apparently an attempt at this late date to change definite stipulations of the record. As we have stated, we do not see the relevancy or importance of any permit issued under Section 42 when Section 232 of the Constitution and Section 54 of the 1927 Act are before the Court. If, however, the Court should deem that in any way this should be considered, we have attached in appendix copies of the application for admission filed in the State Auditor's Office, and application for the permit under Section 42 of the various years subsequent to qualification and prior to the assessment. In none of these is there any reference to interstate commerce. This reference is first made in the permit applied for for 1931.

The appellant (brief, p. 30) to the contrary, we submit that the failure to state in the contract with the Tennessee Company that the sales are to be made in interstate commerce sheds some light on the matter. Evidently counsel for one or both of the par-

ties were unwilling to incorporate such a legal conclusion.

Appellant introduced into the record District Judge Grubb's decree in receivership proceedings. What effect an exparte or uncontested order, as presumably this was, can have we are unable to see.

The cases cited by appellant are not analogous with the possible exception of Ozark Pipe Line v. Monier.

Cooney v. Mountain States Tel. & Tel. Co., 55 Sup. Ct. 477; 294 U. S. 384, levied a license tax on each telephone receiving set. Plainly it affected every transaction and was on the business rather than the corporate franchise.

In Airway v. Day, 266 U. S. 71, the statute levied a tax of 3/30 of one per cent. upon "the proportion of the *authorized* capital stock of the corporation represented by the property *owned* and *used* and *business transacted* in this State." Clearly this was an excise tax on the business. Also "authorized capital stock" is quite a different basis of measurement from "capital employed in the State."

The decision of the Supreme Court of Alabama changes, we submit, the postulates on which the majority opinion in the Anglo Chilean Nitrate case was based so as to render it no longer of decisive force. The basis of the minority opinion was approved and sustained by the opinion.

However, under the actual facts, this appellant's activities in Alabama were incomparably more numerous and more important than those of the Nitrate Company. The Nitrate Company had not made Alabama its corporate home, the seat of its corporate government.

In State Tax Commission v. Gas Co., 284 U. S. 41, the facts were too limited to make a comparison. There were no sales to consumers upon "time to time orders" so far as the opinion shows.

Ozark Pipe Line v. Monier, supra, is appellant's almost sole pertinent authority. We have discussed this heretofore. Mr. Justice Sutherland in the Atlantic Lumber case effectually disposed of it, we submit, as did the dissenting opinion of Mr. Justice Cardozo in the Anglo Chilean case.

The dissenting opinion of Mr. Justice Brandeis fully supports our contentions, both on the nature of the tax and on the fact that the measurement which is here used is not open to the objections made.

A tax measured by property in the State, if otherwise valid, is not a tax on interstate commerce. This Tax is levied uniformly and without discrimination and its effect on interstate commerce is only indirect and incidental. It is no more a burden than a property tax.

The decisive factors in the Ozark case are not here. There oil was neither received nor sold in Missouri. Here gas is received, orders therefor

taken, and the gas sold in Alabama. The qualification here, as shown by the *record*, was a grant of unlimited authority. There it was for engaging exclusively in the transportation of oil by pipe line. The tax is laid here on the privilege of exercising corporate functions in Alabama or the exercise of corporate functions. Quite different, we submit, from the Missouri statute which, as shown in the Middlekamp case, supra, was plainly an excise tax.

In conclusion we submit:

The tax was validly levied and the decision of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,

A. A. CARMICHAEL,
Attorney General of Alabama.

JOSEPH P. CHAMBERLAIN,
NOEL T. DOWLING,
FRONTIS H. MOORE,
Special Assistants to the Attorney General of Alabama.

APPENDIX

APPLICATION FOR QUALIFICATION AND ADMISSION TO THE STATE FILED IN STATE AUDITOR'S OFFICE

To the State Auditor of Alabama:

The Southern Natural Gas Corporation, a corporation organized under the laws of Delaware, being desirous of entering the State of Alabama for the transaction of business therein, files the following statement under Act of Legislature approved Nov. 30, 1907, and Section 3648, of the Code of 1907:

That the name of the corporation is Southern Natural Gas Corporation; that it was incorporated under the laws of Delaware; that its principal place of business is 19-21 Dover Green, Dover, Del.; that its principal place of business in Alabama is c/o A. H. Arrington, 18½ S. Perry St., Montgomery, Ala.; That the name of its authorized agent thereat is A. H. Arrington, whose postoffice address is 18½ S. Perry St., Montgomery, Ala.; that the amount of the total authorized capital is 2,000 shares without par value; that the amount of the actual paid in capital is $20. Company just organized, and that the actual amount of capital employed or to be employed in the State of Alabama is none, company just organized.

The foregoing statement is rendered by the President and Secretary of said Corporation and signed

by them respectively under oath, with the corporate seal attached.

..... President.
Raymond J. Gorman, Secretary.

Sworn to and subscribed before me this 10th day of May, 1928. as witness my seal of office.

Samuel C. Wood.

NOTE. Under said Act the amount of the Charter fee to be paid into the State Treasury for the use of the State is as follows: Each foreign Corporation whose actual amount of capital employed or proposed to be employed in the State is $100.00 or less shall pay a charter fee of twenty-five per cent. of the actual amount of capital employed or proposed to be employed; when it exceeds $100.00 and does not exceed $1,000.00, shall pay in addition to the twenty-five per centum on the first $100.00 five per centum upon all such remaining capital up to, and not exceeding $1,000.00. And when it exceeds $1,000.00 shall pay one-tenth of one per centum additional upon all such remaining capital over and above $1,000.00. All corporations or mutual companies which have no capital stock and all corporations which shall engage in this State, solely in the business of lending money, shall pay a fee of $25.00.

(A COPY)

No. Permit.....

FOREIGN CORPORATION

CERTIFICATE OF APPLICATION BY FOREIGN CORPORATION FOR PERMIT FOR THE TRANSACTION OF BUSINESS IN THE STATE OF ALABAMA DURING THE CURRENT YEAR.

To the Secretary of State of the State of Alabama:

The Southern Natural Gas Corporation, a corporation organized under the laws of Delaware, being desirous of entering, or having entered, the State of Alabama for the transaction of business therein, files the following statement under an Act of the Legislature of Alabama, approved July 22nd, 1927:

That the name of the corporation is SOUTHERN NATURAL GAS CORPORATION.

That its address is 19-21 Dover Green, Dover, Delaware.

That is was incorporated under the laws of Delaware.

That its principal place of business in Alabama is c/o A. H. Arrington, 18½ So. Perry St., Montgomery, Alabama.

That the name of its authorized agent thereat is A. H. Arrington.

That the actual amount of capital employed in the State of Alabama is 2,000 shares with no par value.

Name of President of said corporation ARTHUR W. BRITTON.

Name of Secretary of said corporation RAY MOND J. GORMAN.

IN WITNESS WHEREOF, the said corporation or association has caused these presents to be signed by its secretary, and attested by its corporate seal, at its office in New York., this the 10th day of May, 1928.

Seal F 1665

(Signed) RAYMOND J. GORMAN,
Secretary.

(A COPY)

No. Permit, F 910.

FOREIGN CORPORATION

CERTIFICATE OF APPLICATION BY FOREIGN CORPORATION FOR PERMIT FOR THE TRANSACTION OF BUSINESS IN THE STATE OF ALABAMA DURING THE CURRENT YEAR.

To the Secretary of State of the State of Alabama:

The Southern Natural Gas Corporation, a corporation organized under the laws of Delaware, being desirous of entering, or having entered, the State of Alabama for the transaction of business therein, files the following statement under an Act of the Legislature of Alabama, approved July 22nd, 1927:

That the name of the corporation is SOUTHERN NATURAL GAS CORPORATION.

That its address is Room 1108, 44 Wall St., New York City., 19-21 Dover Green, Dover, Del.

That is was incorporated under the laws of Delaware.

That its principal place of business in Alabama is c/o A. H. Arrington, 18½ So. Perry St., Montgomery, Alabama.

That the name of its authorized agent thereat is A. H. Arrington.

That the actual amount of capital employed in the State of Alabama is none.

Name of President of said corporation, R. C. Sharp.

Name of Secretary of said corporation, J. J. Wentworth.

IN WITNESS WHEREOF, the said corporation or association has caused these presents to be signed by its secretary, and attested by its corporate seal, at its office in New York, N. Y., this the 26th day of January, 1929.

F 910.

J. J. Wentworth, Secretary.
For the Year 1930

(A COPY)

No. Permit.....

FOREIGN CORPORATION

CERTIFICATE OF APPLICATION BY FOREIGN CORPORATION FOR PERMIT FOR THE TRANSACTION OF BUSINESS IN THE STATE OF ALABAMA DURING THE CURRENT YEAR.

To the Secretary of State of the State of Alabama:

The Southern Natural Gas Corporation, a corporation organized under the laws of Delaware, being desirous of entering, or having entered, the State of Alabama for the transaction of business therein, files the following statement under an Act of the Legislature of Alabama, approved July 22nd, 1927:

That the name of the corporation is SOUTHERN NATURAL GAS CORPORATION.

That its address is Watts Bldg., B'ham., Alabama, Room 1108, 44 Wall St., New York.

That it was incorporated under the laws of Delaware.

That its principal place of business in Alabama is c/o A. H. Arrington, 18½ So. Perry St., Montgomery, Alabama.

That the name of its authorized agent thereat is A. H. Arrington.

That the actual amount of capital employed in the State of Alabama is in excess of $50,000.

Name of President of said corporation J. H. White.

Name of Secretary of said corporation, W. R. Gignilliat.

IN WITNESS WHEREOF, the said corporation or association has caused these presents to be signed by its Asst. Secretary, and attested by its corporate seal, at its office in New York, this the 18th day of December, 1929.

F 168.

J. J. Wentworth, A. Secretary.

General Acts of Alabama, Special Session 1907, page 200.

No. 92) "AN ACT (H. 126

To amend sections 1321 and 1322 of the code of 1896, as amended by the act approved March 7, 1907.

"Section 1. Be it enacted by the legislature of Alabama, That section 1321 of the code of 1896 be and the same is hereby amended so as to read as follows: 1321. Admission fees exacted by foreign corporations. No corporation created by the laws of any other State or of any foreign country, except foreign corporations which qualified in good faith to do business in this State prior to March 7, 1907, shall engage in or transact any business in this State without first having paid into the treasury, for the use of the State the following charter fees: each foreign corporation whose actual amount of capital employed or to be employed in this State, is one hundred dollars or less, shall pay a charter fee of twenty-five per centum of the actual amount of capital employed or to be employed in this State by it. Each foreign corporation whose actual amount of capital employed in this State exceeds one hundred dollars and does not exceed one thousand dollars, shall pay a charter fee of twenty-five per centum upon the first one hundred dollars of the actual amount of capital employed in this State by it, and five per centum upon all such remaining actual amount of capital employed in this State by it over one hundred dollars, and up to and not exceeding the said limit of one thousand dollars. Each foreign corporation whose actual amount of capital

employed in this State exceeds one thousand dollars shall pay a charter fee of twenty-five per centum upon the first one hundred dollars of actual amount of capital employed in this State by it and five per centum upon all such actual capital employed in this State by it over one hundred dollars and up to one thousand dollars. And one-tenth of one per cent of such actual amount of capital in excess of $1000. All corporations which shall engage in this State solely in the business of lending money shall pay a fee of $25.00.

"Approved Nov. 30, 1907."

OPINION OF ATTORNEY GENERAL

Montgomery, Alabama,
Sept. 29, 1924.

Hon. Brooks Smith,
Member State Tax Commission,
Capitol.

Dear Sir:—

In answer to your letter of Sept. 16, will say that in my opinion Sections 7214, 7215, and 7216 of the Code of 1923 were repealed by implication by Sections 11, 11½ and 12 of Act No. 172, Acts 1923, pages 152 et seq. approved August 22, 1923.

Section 7216 of Code of 1923, declares that the franchise tax required by said Section 7214 shall be the franchise tax required by Section 232 of the Constitution of the State of Ala. Subsequent to the adoption of the Code of 1923, which was done on the 17th day of August 1923, said Act No. 172 was passed and approved. The franchise tax required by Section 232 of the Constitution was there fully provided for in Sections 11, 11½ and 12 thereof. This subsequent statute did, in our opinion, repeal by implication said Sections 7214, 7215 and 7216 of the Code of 1923.

In my opinion neither Section 7214 of the Code of 1923, nor the said Act No. 172, had the effect of repealing Act No. 92, Acts 1907, Special Session, page 200, requiring foreign corporations to pay an

admission fee. This admission fee is, in my opinion, strictly a revenue measure. The Act adopting the Code specifically provides that "no statute applying to the revenue laws of the state—shall be repealed or affected in any manner by the adoption of this Code, or by the failure to incorporate such statutes as a part thereof.

Respectfully,
(signed) A. A. EVANS,
Special Assistant Attorney General.